No. 11308

In the United States Circuit Court of Appeals for the Ninth Circuit

NYE & NISSEN (A CORPORATION) AND ABRAHAM MONCHARSH, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF FOR APPELLEE

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SUBJECT INDEX

767500—47——1

TABLE OF AUTHORITIES CITED

Cases:

Cases—Continued

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STATEMENT [1]

In order to inform the Court with definiteness of the more important evidence offered and received at the trial in the District Court, it is deemed important to make an extended statement embodying a considerable amount of detail of the testimony of a number of witnesses relating to both the conspiracy count (count 1) and to the substantive counts (counts 2 to 7) of the indictment. This is done in order to show the Court that the evidence in the case establishes the

[1] Throughout this brief, in the interest of brevity, the following frequently appearing names are abbreviated as follows:

United States Army and War Department—"Army";
United States Navy and Navy Department—"Navy";
War Shipping Administration—"WSA";
United States Department of Agriculture—"USDA."

guilt of the appellants by the most overwhelming and incontrovertible proof.

This case comes under the category of "War Frauds," and involves charges of fraud upon the United States in connection with contracts for the supplying of food products. The defendant corporation, under the dominating influence of the defendant Moncharsh, had been engaged for many years in the sale, on a large scale, of eggs, butter, and cheese to the Army and the Navy and to shipping companies operating fleets of ships from the port of San Francisco. It maintained warehouses and gathering depots for eggs in a number of places contiguous or conveniently located to its principal place of business in San Francisco where orders were received and deliveries made at the waterfront and at Army depots there and in Oakland. Shortly after the attack on Pearl Harbor and the commencement of the war the Government took over the control and operation of all ships adapted to the shipment of troops and supplies, and created the War Shipping Administration for the supervision and financing of such control and operation.[2] The WSA, under its authority, thereupon entered into general agency contracts with the various shipping companies whereby these companies continued to operate the ships under orders of the WSA, and as such general agents they were supplied severally by the WSA with revolving funds from which all expenditures were paid for maintenance,

[2] U. S. C., Title 50 Appendix, Sec. 1295, and Executive Order No. 9054, issued February 7, 1942.

wages, supplies and other cargo, including the purchase from the defendant company of eggs, butter, and cheese for the provisioning of the crews during the ships' voyages and also to supply the troops when the ships were utilized as troop-carriers.[3]

The indictment is in seven counts, the first charging conspiracy to defraud the United States (18 U. S. C. 88) and the last six charging the substantive offenses of making false claims against the United States based on fraudulent invoices for food products, namely, eggs and cheese (18 U. S. C. 80).[4]

In appelants' brief, pages 3 to 9, they give a somewhat abbreviated description of the indictment which seems to be sufficient for the purposes of the appeal. There is a minor error on page 4 which gives the alleged duration of the conspiracy as "from January 1, 1938, until June 20, 1946." The latter date should be 1945. This mistake is due to a typographical error in the printed record at page 26, which shows the filing date of the indictment as June 20, 1946. The trial of the case was completed before that date and the error is obvious. Otherwise the appellee adopts this description of the indictment except as hereinafter enlarged.

It should be observed at the outset that the guilt of Berman and Goddard is practically admitted by appellants' recital of the evidence. Not only were these

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[3] This practice and routine are explained by the testimony of several witnesses who were executives of shipping companies, e. g., testimony of Hugh Gallagher, Vice-President of Matson Navigation Co., Record pp. 1426–1441.

[4] These sections of Title 18 are quoted in full in the appendix.

two convicted by the jury and sentenced by the Court, but no appeal was instituted by them. It is to be noted further that they were represented by the same counsel who, in their behalf, elected to let the judgment stand without effort for review, and to place their reliance, on behalf of Moncharsh and the corporation, on a claim that the evidence was insufficient to bring the latter into the ambit of guilt which had been amply and conclusively proved as to the former. Thus the entire flavor of the appeal is to saddle upon the subordinate employees the entire burden of a series of crimes of which the appellants were not only the beneficiaries but the guiding force.

The cruel and arrogant attitude of Moncharsh in permitting his subordinates to take the blame and the burden of imprisonment without appeal became apparent at the time of sentence, when he alone sought to be enlarged on bail pending appeal. The Court was so obviously shocked at this selfish disregard by Moncharsh of the interests of his fellow convicts that it was considered as a substantial ground, among others, for denying the application for bail (R. 4434–4435).

THE EVIDENCE TO PROVE THE CONSPIRACY ALLEGED IN COUNT I

The first count of the indictment charges that during the period from January 1, 1938, to June 20, 1945, the defendants conspired to defraud the United States. The means and manner of practicing and effectuating this fraud are described in the indictment with great definiteness (R. 4–8) but for the sake of

brevity and clarity they may be paraphrased as follows:

The defendants conspired to sell to the United States inferior products (i. e. eggs, butter, and cheese)—

> (1) By false grading, weighing, and packing and by fraud and deception practiced upon the inspectors, graders, and agents of the Department of Agriculture, the War Shipping Administration, and the Army and Navy, thus impeding and defeating the lawful functions of those governmental agencies, and
>
> (2) By circumventing and avoiding the standards, grades, weights, and specifications to which said purchases are subject by means of false and fictitious inspection, grading, and weighing; by the prevention of honest and accurate inspection, grading and weighing by said representatives; and by other tricks, schemes, devices, and concealments.

It is important to note that following the above generalizations the indictment mentions thirteen specific methods which illuminate the "tricks, schemes, devices, and concealments" planned by the defendants in carrying out their fraudulent purpose. Thus it is alleged that the defendants—

> (a) Would secretly place stamps, falsely indicating inspection and grading by inspectors and graders of USDA and Army, upon cases of eggs which had not been officially inspected or graded;
>
> (b) Would prepare sample cases of eggs which were of a higher grade than the lot that were to be inspected and graded, and submit

these sample cases to the inspectors and graders instead of the cases designated by the latter, many of these lots of eggs being then delivered to the WSA and the Army;

(c) Would repeatedly cause the inspectors and graders to inspect and grade the same case of eggs, which contained a higher grade of eggs than the remainder of the lot being inspected, instead of submitting for such inspection the cases designated by the inspectors;

(d) After cases of eggs had been inspected, graded, and stamped by inspectors, would remove the stamps and resubmit the same cases for further inspection.

(e) After cases of eggs had been officially inspected, graded, and stamped, would remove the eggs from the cases and replace them with eggs of an inferior grade.

(f) Upon rejection of a delivery of eggs by the WSA or the Army because the eggs were not of the quality represented, would rearrange the lot and redeliver the same eggs, falsely representing them to be different eggs;

(g) Would mix cases of eggs which had not been inspected with cases of eggs which had been officially inspected, graded, and weighed and deliver them to the WSA, falsely representing the whole lot as having been officially inspected, graded, and weighed;

(h) Would mix cases of eggs of a lower quality and weight with a lot of eggs of a higher quality and weight, and deliver the mixed lot to WSA and the Army, falsely representing the grade and weight of the entire lot;

(i) Would misrepresent the grade, weight, and price of eggs delivered to the Army and to WSA;

(j) Would cut underweight butter to be inspected, graded, and weighed by inspectors and graders of the Army, conceal this fact from the inspectors, and submit for their inspection and weighing prints of butter specially cut to conform to the required weights;

(k) Would recut butter previously rejected by the Army Inspectors and in their absence so commingle it with inspected butter that it was accepted by the Army;

(l) Would misrepresent the weights and prices of butter sold to WSA and the Army;

(m) Would misrepresent the weights and prices of cheese sold to WSA.

In furtherance of the conspiracy five overt acts are alleged. These are described on page 6 of the appellants' brief.

All of the foregoing recitals of purpose and of fact touching the allegations of the first count were amply proved; indeed, they were proved by overwhelming and conclusively convincing evidence. The testimony of the more important witnesses for the Government in proof of the allegations of the conspiracy will now be given in some detail.

The Testimony of Henry L. Pineda

This witness by his testimony proved every allegation of the indictment relating to the conspiracy count with the sole exception of the last of the thirteen specific methods of perpetrating the fraud, which refers to misrepresenting the weights and prices of cheese (R. 8). He also proved overt acts A and C alleged in the indictment (R. 8, 9). Thus, with the testimony of Pineda alone, the evidence was sufficient

to take the case to the jury, without the corroboration and support which other testimony supplied.

At the time of the trial Pineda was a young man apparently about 35 years old. He was employed by Nye & Nissen for about nine years, beginning about 1934 and extending to October of 1942. In February of 1943 he returned to their employ and remained for about five weeks. His duties during the whole period were those of a general utility man in the plant, working as a laborer in the breaking room where eggs were broken into cans, assisting in the candling room and in the butter room, and working on the floor storing eggs and placing them where told. Also at times he drove a small truck and helped on the trucks in making deliveries (R. 444, 445).

The witness described the apparent functions of Moncharsh as he observed them during the course of his employment. He stated that Moncharsh had charge of the plant and came down from his office frequently and gave Goddard orders. If anything went wrong or anything had to be done, Moncharsh was the man to give the final word. Deliveries of eggs to the warehouse were under the supervision sometimes of Moncharsh and sometimes of Goddard, and when an order was to be filled it would come from Moncharsh to Goddard, who, in turn, would pass the order to other employees (R. 446, 460, 461). Again, on page 489 of the record, Pineda stated that Moncharsh came to the floor of the warehouse every day, usually about 10 or 11 o'clock in the morning and again about 4 o'clock in the afternoon.

Pineda further describes the functions of the other employees, including the defendants Berman and Goddard. Goddard was shipping clerk and general foreman of the main warehouse, and received his orders from up in the office. He supervised the receipt and delivery of eggs, butter, and cheese. Berman's duties were largely subordinate to Goddard's in connection with the filling of orders and directing the truck drivers in connection with deliveries (R. 447–452).

The witness described the plant in detail, and in particular the candling room, which was used by the girl candlers and also by Government inspectors both of the Department of Agriculture and the Army in making examinations and inspections of eggs. This candling room was at one end of the warehouse and had an outer wall coming up about four feet from the floor, with a bench extending the length of the room. Above this bench were 10 lights or candles for 10 girls. Above the bench was a curtain to exclude the light. This curtain was in strips so that a case of eggs could be shoved in without lifting the whole curtain. The bench was about six feet wide so it would hold two cases of eggs lengthwise (R. 454, 455).

The witness described the manner in which egg cases were labeled: blue labels for large eggs, green for mediums, and black for the pullet or peewee eggs. Eggs that were of low grade were indicated by different labels so that from these paper labels the character of eggs could readily be identified (R. 460).

In the course of his testimony Pineda recited the details of a number of episodes occurring during the

course of his employment which demonstrated the deceit practiced in connection with the inspection of eggs by Government inspectors both of the Department of Agriculture and of the Army. One of these episodes occurred in the summer of 1941. In his testimony there was some confusion as to the year in which this occurred but it was finally fixed with definiteness as being in June of 1941, and he stated that the confusion of dates was due to the fact that there were so many similar occurrences all during the period of his employment, that definite dates were difficult to give (R. 481). Witness stated that he had been working in the breaking room and was called out to take over Menges' job on his bench, and Moncharsh, Goddard, and Menges went into a conference about a particular order which was to go into cases with no labels on them. Pineda knew this was a Government order because Army inspectors came and inspected the eggs. He was close enough to Moncharsh, Goddard, and Menges so that he could hear the discussion among them. These instructions were that the girl candlers make up certain sample cases, with the "cut-outs" all to go in other cases but in the same type of case, the only eggs to be excluded being black rots and leakers (R. 463–466). These terms were explained by the witness as follows: when eggs are candled the grade A mediums would be segregated to be used as samples for inspection by the Government men, and all the inferior eggs would be put in other cases and those were denominated "cut-outs" (R. 467, 468). Pullet and pewee

eggs were defined by the witness as eggs below any acceptable size, the grades for sizes being "large," "medium," and "small." The minimum weight of small eggs as established by Government regulations was 34 pounds for the 30 dozen eggs in a case, and the peewees or pullets would therefore be less than that minimum weight. The minimum required weight of large eggs was 45 pounds, and of medium eggs 40 pounds (R. 514, 515).

The witness stated that the entire shipment of eggs involved in this transaction had been brought in from the Petaluma plant of Nye & Nissen, but had not been candled before arriving in San Francisco. Upon being candled they were placed in separate cases as above described, and the cases containing good eggs and referred to as sample cases were given a particular mark so that they could be identified. In accordance with these instructions from Moncharsh, the eggs were candled and segregated into sample cases and cut-outs, with identifying marks on the sample cases so that if for inspection purposes the Government inspectors selected one of the bad cases the employees could switch it away and substitute one of the sample cases so that only the good eggs would be inspected and approved. Inspection by Army officers then followed, and upon the sample cases submitted to the inspector being approved, all the cases were given the Government stamp, with the result that at least half the cases, which were destined for overseas shipment or to the Presidio, contained inferior eggs. Operations of this character were corroborated in the

later testimony of Colonel Hand, Army inspector, who found bad eggs in deliveries both to the Presidio and to Letterman Hospital (R. 396–407). Eggs for overseas shipment were not given a second inspection before being loaded on ships (R. 423), with the result that the soldiers overseas received a large percentage of bad eggs although all bore the Government stamps. It further appears from the later testimony of the witness (R. 891–895) that after the good grade A eggs contained in the sample cases had been stamped by inspectors, either of the Army or USDA, on instructions the employees would transfer the good eggs contained in the sample cases into other cases and substitute cut-outs for an entire shipment. This occurred particularly in cases that were delivered to WSA boats carrying cargo for overseas, these eggs being for the use of the crew during the voyage.

In the ordinary course of candling eggs and separating the acceptable eggs from cut-outs, the witness testified that eggs of different qualities would be placed on trays containing about 30 cases to a tray and these were placed in different locations in the warehouse so that they could easily be identified in loading the trucks for delivery, all the sample cases being put in one place, the cut-outs in another, and the peewees or pullets in another (R. 487–489).

In connection with this episode the witness testified that it took two or three days to finish putting up the order, after which Goddard called up the Army inspectors to come and inspect the eggs. The handling of the eggs upon the arrival of the inspector was a

matter of routine about which the witness had received repeated instructions during the course of his employment, and this routine was followed by the witness and other employees to the end that the Army inspector would examine and candle eggs only from the sample cases (R. 493). In this same connection Pineda testified that it was a common practice under instructions from his superiors to deceive the inspectors in the following manner. A sample case would be pushed into the candling room through the curtains where the inspector was working, who would then examine only the eggs in one-half of the case. Having found the eggs satisfactory by this examination he would shove the case out through the curtains, and thereupon the employees would turn the case around and shove the other end into the inspector, who, without detecting the deceit, would examine these eggs under the supposition that he was inspecting a second case (R. 498). After this process of inspection, the inspector then counted the cases prepared for the complete shipment and on the strength of his "spot" inspection placed the Government stamp on all the rest of the cases, most of which were cut-outs (R. 499, 500). In connection with this episode and also other instances of a similar character, Pineda mentioned the name of the Government inspector as Colonel Foster. It later appeared that the witness was mistaken in the name of the inspector and changed his testimony so as to substitute the name of Colonel Kielsmeier (R. 1294, 1295).

The defendants in their brief, on page 30, attempt to make much of this confusion of names on the part of

767500—47——2

Pineda. As a matter of fact, however, it was an entirely reasonable mistake. Both Colonel Foster and Colonel Kielsmeier had served as Army inspectors at the Nye & Nissen plant, and it is not surprising that after a lapse of several years the witness should confuse one with the other. In the record at pages 1294 to 1296 Pineda corrected this error.

Pineda described another method of deceiving Colonel Kielsmeier, who came to the Nye & Nissen plant very frequently to inspect eggs. It was the Colonel's custom, after selecting cases to be inspected, to mark these cases with a brush and ink. He would then go into the candling room, and the employees would pass the cases in to him successively. Whenever in selecting these cases for inspection he thus marked a case of cut-outs, either Pineda or Menges, on instruction from Goddard, would substitute for the case of cut-outs a case containing good eggs (a sample case) and would then mark this with a brush and ink in the same manner used by Colonel Kielsmeier. This was done while the Colonel was in the candling room and unable to observe what was going on. The brush and ink used by the employees in this deception were supplied to them by the defendant Goddard.

Before they got the new brush and imitated Kielsmeier's mark the practice was adopted of taking the labels off the cases which Kielsmeier had marked with his brush, when these cases contained cut-outs, and pasting these labels on cases with good eggs in them. This was an unsatisfactory method and took so much time that it became necessary to get a similar brush and ink so as to avoid removing the labels.

In connection with Colonel Kielsmeier's inspection, Pineda testified that on one occasion the Colonel brought a soldier with him to remain outside the candling room where he could watch and see that the proper cases of eggs were passed to him in the candling room. In order to dispose of this soldier while they were switching cases on Kielsmeier, Goddard told the soldier that his car was in the way and instructed him to go out and move it. In the meantime, Pineda and Goddard replaced the cut-out cases with sample cases (R. 493–495, 818–820, 824–826, 829, 830).

The witness described the manner of handling peewee or pullet eggs. This is significant in considering the testimony relating to the substantive counts of the indictment where it appears that such unacceptable eggs were delivered to ships of the WSA and charged to the Government as medium or large eggs.

It appears that when the candlers segregated cases of peewees or pullets, it was customary to put a little card on the top of the eggs containing the penciled word "peewee" or "cut-out." When such a case was passed out of the candling room it was customary for the employees to remove this card and, after nailing a top on the case, the letter "P" would be placed on the label either with pencil or with a rubber stamp. The label used on such cases was a green label, containing the words "Thirty Dozen Medium," a clearly premeditated deception. It sometimes occurred that in placing the top on a case the employees inadvertently left the peewee or pullet card where the candler had placed it on top of the eggs, and Pineda identified seven such cards, exhibits 36 to 42, which were later

identified by witnesses who had removed them from egg cases delivered to WSA ships (R. 508–513). Pineda also stated that they had a place on the floor where peewee eggs were always stacked. This is important in connection with the testimony of the truck driver Nystrom who told of instructions from Goddard to load peewees on his truck for delivering to WSA ships, in which Goddard directed him to this particular place where they were stored.

The witness described an incident which occurred in February 1941 when a lot of fresh eggs were placed outside the candling room for inspection by Colonel Hand of the Army. Colonel Hand selected at random certain of these cases which he wanted brought into the candling room where he could examine them. While this was being done the remainder of the eggs were moved into the cooler and the same number of storage eggs were brought out and placed where the others had been on the floor. After Colonel Hand had candled the eggs which he had designated and found that they were of the desired grade he came out of the candling room and, under the assumption that the eggs there were of the same grade as those he had inspected, placed his seal or stamp on all of them. The only cases of good eggs that he stamped were the seven or eight cases which he had actually candled. Moncharsh was on the floor the day before this inspection and he instructed Pineda and the other employees to do a good job because Hand was going to inspect that order. Three or four days later Colonel Hand came in to inspect another Army order

and the same eggs which he had previously approved were again submitted to him for candling. In the same manner as previously, storage eggs were substituted for the fresh eggs which Colonel Hand had approved. By repeating this process, Colonel Hand inspected the same lot of eggs five or six times (R. 785–812).

On an earlier occasion in the latter part of 1938, Pineda testified, while he, Nix, and Andrade were eating their lunch in the warehouse the defendant Moncharsh came down from the office and complained about an Army order that had been rejected by inspectors. In answer to Moncharsh's complaint, Nix said to him, "We used these same egg samples for a long time and they're old as the hills." Moncharsh replied in a jocular tone, "You can't go by eggs. Don't forget, in wine the older it gets the better it is." Defendant's counsel objected to this testimony but the Court admitted it on the basis that it showed knowledge on the part of Moncharsh of the fact that inspection of the same eggs was made over and over again (R. 841, 842).

At considerable length (R. 843–851) the witness described a counterfeit stamp in imitation of the Deparment of Agriculture stamp then in use which was secured by Nye & Nissen and kept in Goddard's possession. It was secured about 1935 and used from time to time until in 1939 when the Department of Agriculture changed its stamp and also changed its method of indicating the quality of eggs. Thereafter, the counterfeit stamp could no longer be used. This

stamp was utilized by Pineda and by the defendants Goddard and Menges to stamp cases that had not been inspected and which contained inferior eggs. It was kept in a wooden box in the upstairs office, and Pineda testified that he had seen it used forty or fifty times in thus fraudulently marking cases of eggs that had not been inspected. As hereafter appears, the witness Andrade testified to the use of this counterfeit stamp, and stated that he had also seen the defendant Moncharsh use it (R. 3258, 3259).

In connection with the routine stamping of egg cases by the Army inspector, Pineda testified that on occasion the inspector would hand the stamp and pad to him or to Goddard to stamp cases which the inspector had approved. On occasions of this sort, Goddard and Pineda stamped a lot of loose labels while the Army inspector was not looking. These were kept on a shelf in the butter room and later applied to cases containing inferior eggs. Also when the inspector was not looking they stamped cases of eggs that did not belong to the lot which the inspector had approved (R. 882–884).

Pineda also described the custom of buffing and scraping stamps off the cases. After eggs had been inspected and the cases stamped, the stamps would be buffed off and the same cases passed to the inspector in the candling room for another inspection. This was but another method of deceiving the inspector and was practiced in connection with inspections by Moosman, USDA inspector, and the witness referred particularly to an occasion in January of 1942 when

this occurred. He stated that Goddard told him to make sure that the scrapings did not get into the cases because Moosman was coming again the following day to inspect them, and Pineda watched this second inspection of these same eggs. He further stated that the same process of stamping and buffing again occurred, so that Moosman inspected the same eggs three times (R. 884–888).

Another fraudulent practice described by Pineda related to the switching or transferring of eggs from one case to another. When a considerable number of cases of good eggs had been inspected, approved, and stamped, and after the inspector had left, the eggs would be transferred to unstamped cases and inferior eggs put in their place. The witness described one occasion about November of 1941 when a number of employees were called upon to work in the evening to switch eggs from a large number of cases. All the defendants, including Moncharsh, were present, besides Pineda and several of the girl candlers. In doing this work the defendant Moncharsh himself started transferring some of the eggs but he was too awkward and slow and finally stopped and helped in replacing the covers on the cases (R. 891–895).

In connection with the grading, weighing, stamping, and inspection of butter, Pineda described an occasion in February of 1942 when butter was being inspected by Colonel Hand. He stated that eight or ten thousand pounds of butter were involved in this transaction. Colonel Hand and his inspectors scored the butter by examining one sixty-pound cube of

every churn, and upon this inspection certain churn numbers were rejected and set apart and those that were accepted were taken out of the cooler and brought to the butter cutting room. Colonel Hand arrived at about 8 o'clock in the morning but before that time, under instructions from Goddard, the employees had cut a quantity of the rejected butter. After their arrival the butter was cut in their presence, but whenever they were not in the immediate vicinity of the butter cutting machine Pineda, again under instructions from Goddard, cut the butter short weight by one ounce per pound. This was done by manipulating a handle at the butter cutting machine. This whole process is completely described by witness, who gave the details of the method whereby the inspectors were deceived and the manner in which inferior butter and short weights were imposed upon the Army inspectors (R. 903–915). The date of this occurrence is fixed with absolute certainty by Pineda because it was a few days after his wife had given birth to a child (R. 917), and corroboration to an extent was supplied by the testimony of Captain Mencimer, who testified to the discovery of short weight butter which had been delivered to the Army (R. 3115–3124).

In the foregoing recital of fraudulent practices observed and participated in by Pineda, we have only touched the high spots of his testimony, which contains many more similar occurrences. We have attempted only to show a pattern of fraud which is thus demonstrated, without unnecessary extension of this statement.

In his testimony Pineda told an amazing story of fraud and deception in which all the defendants, including Moncharsh, were active participants. His testimony extended for days, with spirited and extended objections by defendants' counsel which prolonged it considerably, followed by a searching cross-examination extending more than five days which only served to accentuate and confirm the frankness and honesty of the witness. His demeanor on the witness stand carried to the jury his apparent effort to give a truthful account of a continuing pattern of fraudulent conduct. His appreciation of his own participation in this dishonesty obviously spurred him on to tell as complete a story as his memory allowed, without attempting to evade or minimize his own guilty knowledge that fraud was being committed. Altogether his testimony was most impressive and convincing of the defendants' guilt.

The Testimony of Adam Thomas Andrade

The testimony of this witness definitely connected the defendant Moncharsh and all the other defendants with the conspiracy alleged in the first count of the indictment and corroborated the testimony of Pineda in establishing the pattern of fraud which runs throughout the record. He was employed at the Nye & Nissen plant from 1931 until November of 1940. He drove a large truck with a capacity of 150 cases of eggs, and in addition thereto did a large amount of work in the plant consisting of ordinary labor and including the relabeling of egg cases, helping with inspections, and at times candling eggs and working in

the butter room and the breaking room. Aside from driving the truck his duties were exactly the same as those of Pineda. (R. 3220–3221.)

Beginning in 1935 and continuing thereafter as long as he was in the company's employ he often saw in the possession of the defendants and other employees, and including the defendant Moncharsh, a rubber stamp similar to the stamp used by the Department of Agriculture inspector. In connection with the use of this stamp in fraudulently affixing it to egg cases, he refered to it as a "counterfeit" stamp. (R. 3221–3222.) The use of this word was objected to by defense counsel, and the Court struck it from the record. In connection with Pineda's testimony, as outlined in this brief, we have used the word "counterfeit" because it seems appropriate and properly descriptive of the stamp. In the appellants' brief they refer to the stamp as the "alleged spurious stamp" and they seem to prefer that term. Webster's dictionary gives these two words as synonymous. Andrade recounts numerous instances when this stamp was in the possession of Moncharsh and in use by him in affixing it to cases containing inferior eggs which had not been inspected, and it was thus in use, according to his testimony, until he left the company's employ. Its frequent fraudulent use by the defendants is exemplified by Andrade's statements that he saw the stamp in the possession of Goddard "on various occasions, maybe twice a day" during the period of his employment (R. 3225). The witness stated that this stamp when first used was kept in the possession of Goddard in his office on the floor

of the warehouse and later was kept in the upstairs office and located in the safe.

In his testimony Andrade gave the details of various incidents that occurred during his employment which were illustrative of the character of fraud that was habitually practiced by the defendants. One of these incidents related to the delivery of a full truck- and trailer-load of 749 cases of eggs in the summer of 1938 to Fort Mason at the United States transport docks. This load was coming from Petaluma, driven by another truck driver named Smiley, and Andrade was instructed by the defendant Goddard to accompany Smiley in delivering these eggs. He was further instructed that Smiley would tell him how to unload the eggs so that the inspectors could be induced to examine only the sample cases which were to be placed on top of the other cases. He stated that this load consisted of cut-outs with the exception of a few sample cases on the top of each stack. (R. 3229–3234.)

Andrade recounted another instance in the latter part of 1939 when a Navy order of 1,000 cases of eggs were hauled to Pier 56. The time is clearly identified as being just after the beginning of World War II on September 1, 1939. This 1,000-case order was delivered to Pier 56 by Andrade in loads of 150 cases each and was subjected to inspection by Moosman USDA inspector, at the Nye & Nissen plant, but it appears that there was also on occasion a spot inspection at the pier. The whole 1,000 cases had been stamped with the counterfeit stamp while the order was being put up. Inspector Moosman came to the

plant about twice a day for a period of a week in making the inspection. In each instance he inspected a flat of eggs containing 30 cases by candling a number of them. The inspector then put his stamp on all the 30 cases, but after he left, the stamps were removed on the order of Goddard or Berman or Moncharsh by scraping the label with a hand scraper or by an electric buffer, and then the cases were relabeled. Thirty cases of uninspected eggs were then stamped with the counterfeit stamp, and upon Moosman's next arrival there would be submitted to him for inspection the same 30 cases which he had examined previously. Upon these being approved and stamped by the inspector, the employees again buffed off the stamps, 30 cases of uninspected eggs were stamped with the counterfeit stamp, and again the same 30 cases previously inspected would be submitted to Moosman. Andrade was unable to say how many times Moosman inspected the same eggs after the stamps had been removed, but he stated definitely that the same eggs were inspected more than once (R. 3234–3244).

Another similar incident occurred in connection with a shipment of eggs to the Navy consisting of 500 cases. These were inspected by Moosman, and as in the other instances 30 cases were inspected, stamped, and the stamps buffed off, with Moosman again repeatedly inspecting the same eggs. Andrade testified that in the course of this operation, after Moosman had left the plant and Moncharsh himself was in the act of stamping 30 cases with the counterfeit stamp, Moosman returned unexpectedly. When Moncharsh

turned around and saw Moosman he hurriedly stuck the stamp in his pocket. On that occasion Jack Smith, the vice president of Nye & Nissen, was present, and Andrade overheard the following conversation between Smith and Moncharsh. Smith said, "Abe, if you don't cut this kind of business out you are going to get all of us in the penitentiary. You are going too far." Moncharsh replied, "What is the matter with you guys? Are you afraid? These guys don't know nothing anyhow." There was more said on this occasion but in language which the witness did not care to repeat (R. 3256–3259).

Andrade gave the details of an occurrence in the middle of 1939 relating to the delivery by him of a truckload of eggs to the Presidio. Upon inspection at the Presidio the eggs were rejected by Colonel Deane, the Army inspector. Upon informing Goddard on the telephone of this fact, Andrade was instructed to take the load of eggs and drive outside of the Presidio post exchange, shift the load, and wait until ten or fifteen minutes before 11:30, and then take the same load back to the Presidio, because at that time there would be only a sergeant on duty for inspection, the sergeant's lunch hour was 11:30, and he would be in a hurry and would probably pass the same load. Andrade followed these instructions, and upon his returning to the Presidio close to 11:30 everything happened as Goddard had anticipated and the eggs were accepted (R. 3245–3247).

A similar occurrence was related which involved a truckload of eggs which was rejected by Colonel Kielsmeier at the Presidio. Upon calling the office Mon-

charsh answered the telephone, and he instructed Andrade to bring the eggs back to the warehouse where another inspection would be made by Colonel Kielsmeier. Upon arriving back at the plant the load was shifted on the truck and two new sample cases were arranged on the load for Colonel Kielsmeier's inspection. The result was that upon this second inspection the same load of eggs, with the exception of the two sample cases, was taken back to the Presidio. This whole transaction was supervised by the defendant Moncharsh personally (R. 3247–3251).

The foregoing is rather a superficial account of Andrade's testimony, which contains other details which demonstrate the fraudulent practices which mark the character of deceit involved in the company's business with the Government.

In appellants' brief (Br. 37–43) the testimony of Andrade is criticized as incoherent, rambling, and chaotic and as evidencing such bias and prejudice that it should be disregarded. As a matter of fact, the appearance and demeanor of this witness on the stand were such that it was completely convincing to the jury, and there was every appearance that the witness was doing his best to give a true recital of events occurring five or six years previous to the time of his testifying. His memory of past events was no less than remarkable, and his failure to fix exact dates emphasized the truthfulness of his story. The jury's verdict is unquestionable evidence of their belief in his integrity.

The Testimony of Josephine I. Briant

Mrs. Briant was employed by Nye & Nissen from 1930 to 1942, principally at the Petaluma plant. She worked at the San Francisco plant for a period of three months beginning early in September of 1940 until early in December of the same year. Her employment was that of a candler (R. 2177, 2178). She testified that on the first day when she arrived at the San Francisco plant she was ordered by Menges or Nix to select by candling about 20 cases of eggs for an Army order, being assisted by two other candlers. The eggs to be selected were U. S. Specials, the Army equivalent at that time of Consumer A eggs (R. 3181). After the three candlers had candled enough eggs to make the necessary number of cases of U. S. Specials, in the afternoon of the same day, an Army lieutenant came with a driver to assist him and inspected these eggs, approximately 20 cases. After making the inspection and examination by candling two or three cases, he then applied the Army stamp not only to these two or three cases but to the balance of the order. Shortly after the lieutenant and his driver left, the witness and the two other girl candlers were directed to transfer the eggs out of these stamped cases and to substitute inferior eggs in their place, the result being that the cases bearing the official stamp of the Army then contained inferior eggs, including a considerable number of rotten eggs, this all being done under the specific instruction of their superiors at the plant, either Menges or Nix (R. 3182–3188). In cross-examination the witness brought out that in do-

ing the candling it was necessary to powder the eggs because they were storage eggs, this being done to conceal the appearance of storage eggs so that they would have the appearance of fresh eggs. This powdering was also done under the specific direction of her superiors (R. 3195, 3196, 3211–3217). Thus, two separate kinds of fraud were established by this witness, and the testimony of both Pineda and Andrade was clearly corroborated in proof of the conspiracy alleged in the first count of the indictment and as overt acts in furtherance of that conspiracy.

The Testimony of Marie Valdez

This witness was an egg candler for Nye & Nissen from 1941 to 1943 and worked under the instructions of Menges. The company moved from the old plant on Townsend Street to the new plant on Missouri Street about September or October of 1942. During the few months previous to moving from the old plant the witness received instructions from Menges to transfer eggs out of Government-stamped cases and put in their place eggs that had not been inspected—eggs of a different quality—without removing the Government stamp. When asked whether during the period of time immediately following removal to the new plant she had received instructions from Menges to transfer eggs from Government-stamped cases in the same manner, she replied: "Well, I can't be sure of any special time but I know we did it many times" (R. 4289–4292).

On cross-examination the witness repeated the same statement more emphatically, saying that this transfer

of eggs occurred "many times a day for years like another day's work" (R. 4293, 4295, 4297).

This testimony demonstrates the same pattern of faud which runs through the testimony of many other witnesses.

This testimony was followed by that of three other similar witnesses, all of whom were candlers in the employ of Nye & Nissen and all of whom testified to the practice, under Menges' orders, of transferring eggs out of Government-stamped cases and replacing them with other eggs. These witnesses were *Mrs. Eleanor McKenna* (R. 4300–4308), *Juanita Matheson* (R. 4308–4314), and *Violet Higuera* (R. 4315–4319), and in each instance the cross-examination strengthened and emphasized the improper and fraudulent practice referred to.

The testimony of these four girl candlers was offered and received in the Government's rebuttal to impeach the prior testimony of the defendant Menges, whom the jury acquitted. Nevertheless, their testimony corroborated Pineda and substantiated his account of a pattern of procedure which was followed with the knowledge and approval of all the other defendants including that of Moncharsh, the president of the corporation, and, though coming into the case for a limited purpose, became applicable to all the defendants at least insofar as it served to impeach Menges in all of his testimony favorable to all the defendants.

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The Testimony of FBI Special Agents E. Hewitt Magee and Dallas A. Johnson

These special agents of the Federal Bureau of Investigation were in charge of the investigation of this case. Their activities in company with Army officers in the examination and inspection of food products on the several ships where such products were delivered by Nye & Nissen and its officers and employees, are given hereafter in connection with the details of evidence touching these ships and relating primarily to the substantive counts of the indictment.

In this connection, however, there are certain general facts touching the character of the investigation which appear from their testimony. Their primary purpose during the brief period in April and May of 1944 when they visited the ships at the waterfront was to check and examine the eggs delivered by Nye & Nissen (R. 2941). During the first of these visits they did not weigh the cheese included in the deliveries because they had no reason to believe that the defendants were short-weighing it. This they discovered later, and the weighing of cheese then became routine (R. 2918, 2931, 2941). For like reasons they did not at any time weigh the butter because, at that time, they had no knowledge or information that butter was being cut short in weight. However, they "did look at the butter to see whether they had 50 prints in a box of 60, because we had received some complaint in some cases they were putting 50 prints in a box and charging for 60, but we didn't take the prints out and weigh them individually" (R. 2966).

It is further pointed out in Agent Magee's testimony why and when contact was made with the truck driver Nystrom. This first contact was on April 21 or 22, 1944, shortly before the first ship was visited (R. 2857, 2859). The reasons, the purpose, the necessity, and the duration of these contacts were brought out in the cross-examination of the witness by defendants' counsel. Thus the following appears on page 2938 of the record:

> Q. You mean it was indispensable to your investigation that you form a contact with the driver of Nye & Nissen?
>
> A. It was considered so at that time. We didn't wish to contact dozens of people to find out when the deliveries would be made, because we knew if any of those dozens of people should happen to call up the officials of Nye & Nissen Company they would immediately change their policies. We wanted to find what the policies were, so we could check on the deliveries.
>
> Q. At the time you were down there checking certain ships you had already gone to that firm of Nye & Nissen and interrogated employees in that firm, had you not?
>
> A. Had I?
>
> Q. Your department?
>
> A. Possibly so.
>
> Q. There wasn't any question in your mind, was there, that in the months of March, April, and May 1944, that the firm of Nye & Nissen knew that their shipments to the waterfront were being investigated by your department, was there?

A. I am quite sure they did not know it.

Q. You are quite sure they did not know it?

A. From all indications they did not.

And again, at page 2981:

> They knew we were checking the ships, as a matter of fact, after we had done a number of them. That is one reason we stopped because from that time on their deliveries were satisfactory.

At this point, however, we call particular attention to the testimony of these witnesses in rebuttal where the credibility of the defendant Moncharsh is impeached but also where proof is established of his complete dictation of the policies and of the day-to-day operations of the business of his corporation.

The foundation for his impeachment was laid in the cross-examination of Moncharsh at pages 4127 and 4128 of the record as follows:

> Q. Do you remember an interview that you had on the first of September 1944, with the two FBI agents, Mr. Magee and Mr. Johnson?
>
> A. I recollect that they were in to see me.
>
> Q. And you had quite a long conference with them at that time, did you not?
>
> A. No.
>
> Q. And that was here in your office on Missouri and 17th Street, wasn't it?
>
> A. That is right.
>
> Q. At that time didn't you say to these two FBI agents that you personally were familiar with the type and quality of all eggs sold and delivered out of Nye & Nissen's plant in San Francisco?
>
> A. I did not.

Q. And did you not say to them at that time that you knew and were familiar with the grades of all eggs sold to the Government from that plant?

A. I did not.

Q. Did you not also at that time say to them that you personally dictated all the policies of Nye & Nissen and regulated and decided the daily prices of your products?

A. I could not.

Q. And did you not at that same time say to these FBI agents that you knew the quality of eggs on the floor of Nye & Nissen at San Francisco at all times?

A. I could never make such a statement.

Q. You could never make such statements, and you did not make those statements at the time and place indicated; is that right?

A. No. I may say a certain lot of eggs in the morning may be graded AA and in the afternoon they may be graded A.

Q. I am asking you if you made those statements to those FBI agents at the time and place mentioned?

A. I could never make any such statement.

Q. You did not?

A. No.

Mr. Magee and Mr. Johnson both testified that Moncharsh did in fact make these identical statements, the former at pages 4339 and 4340 of the record, and the latter at pages 4346 and 4347.

This testimony should, perhaps, be coupled with the stipulation made early in the trial wherein the de-

fendants admitted the corporate organization of Nye & Nissen, and the character of its business and that, at all times mentioned in the indictment, the defendant Moncharsh was president of that corporation (R. 353, 354). This, with the proof of Moncharsh's participation in the fraudulent practices described in the first count, seems amply sufficient to justify the finding of guilt as to the corporation defendant.

Impeachment of Moncharsh in the S. S. Bates letters

In appellants' brief under Point V (Br. 113–120), it is complained that the Court erred to the prejudice of the substantial rights of the appellants in admitting, over objection, exhibits 179 to 183, inclusive. In the Government's brief, beginning at page 113, we have answered the appellants' arguments. It seems proper, however, in connection with the statement of the evidence in the case, to direct the Court's attention to the concluding cross-examination of the defendant Moncharsh on pages 4153 to 4171 of the record which includes the episodes relating to these exhibits. This matter also appears in full in the appendix to appellants' brief on pages 28 to 44.

We suggest the reading of this cross-examination because it presents a clear-cut impeachment of the veracity of the defendant. A large part of his testimony on direct examination consists of categorical denials of the testimony of Government witnesses, and the impeachment of his integrity thus gains added significance.

Proof of Overt Acts

Overt Act A, as alleged in the indictment, reads as follows (R. 8):

> A. On or about the 1st day of February 1942, at the San Francisco plant of defendant Nye and Nissen, a corporation, defendants Ruby Jutland Goddard and Edward LeRoy Menges and coconspirator James Roosevelt Nix cut one-pound prints of butter, which were being inspected and graded by officials of the War Department, less than one pound and submitted sample prints of butter actually weighing one pound to said officials for inspection and weighing.

The proof of this overt act is made by Pineda in his testimony as set forth at pages 19–20 in this brief, *supra* (R. 903–915). It is therefore unnecessary to repeat it at this point.

Overt Act B, as alleged in the indictment, reads as follows (R. 8, 9):

> B. On or about the 1st day of June 1940, at the San Francisco plant of defendant Nye and Nissen, a corporation, defendants Ruby Jutland Goddard and Edward LeRoy Menges and coconspirator James Roosevelt Nix placed a stamp purporting to be a grading stamp of the United States Department of Agriculture on cases of eggs which had not been graded by United States Department of Agriculture graders or inspectors.

The witness Pineda testified to the occurrences described in this overt act, but instead of placing them "on or about the first day of June 1940" it is indi-

cated that they occurred about two years previous to that date, that is, about the middle of the year 1938. That date is more than three years previous to the enactment of the act of Congress of August 24, 1942, which suspended the statute of limitations in cases involving fraud upon the United States until three years after the termination of hostilities in the War (U. S. C., Title 18., § 590a). This section does not apply to acts which were already barred by the provisions of law existing at the time of the passage of the act. While the acts described are not available as having been committed in furtherance of the conspiracy, they are, nevertheless, available in connection with the other testimony of Pineda to prove the conspiracy itself, but on account of the lapse of time the Government must abandon overt act B as an overt act.

Overt Act C, as alleged in the indictment, reads as follows (R. 9):

> C. On or about the 1st day of February 1942, at the San Francisco plant of defendant Nye and Nissen, a corporation, defendants Abraham Moncharsh, Ruby Jutland Goddard, and Edward LeRoy Menges, and coconspirator James Roosevelt Nix, switched eggs from cases of eggs which had previously been inspected and graded by officials of the United States Department of Agriculture and War Department and inserted in their place eggs of an inferior quality.

This overt act is definitely proved by the testimony of Pineda as summarized on page 19 of this brief

(R. 891–895). The occurrences are described by him as taking place in November of 1941, which is within such a reasonably short time before the date of February 1, 1942, as to come within the definition of "on or about." Having directed the Court's attention to the testimony of Pineda in this connection, it seems unnecessary to repeat it here.

Overt Act D, as alleged in the indictment, reads as follows (R. 9):

> D. On or about the 10th day of May 1944, defendant Ruby Jutland Goddard caused forty-five cases of eggs to be sold to the United States of America—War Shipping Administration, Matson Navigation Co., General Agent, and to be delivered to the Steamship *Cape Breton* at Pier 30 in the City and County of San Francisco, State of California, which eggs were of a lesser grade, weight, and price than that represented to said purchaser.

The evidence to establish this overt act is contained in the account of the delivery of 45 cases of eggs and other products by the defendant Nye & Nissen under the direction of the defendant Goddard on May 10, 1944, to the S. S. *Cape Breton* at Pier 30, San Francisco. The details of this transaction are described along with deliveries to other ships at pages 69–72 of this brief, post.

Overt Act E, as alleged in the indictment, reads as follows (R. 9, 10):

> E. On or about the 10th day of May 1944, defendant Henry Eugene Berman, at the San

> Francisco plant of defendant Nye and Nissen, a corporation, scraped the stamped weights off of four cases of California loaf cheese and caused said cheese to be sold to the United States of America—War Shipping Administration, Moore-McCormack Steamship Co., General Agent, and to be delivered to the Steamship *Cape Cumberland* at Berth 6, Outer Harbor, City of Oakland, State of California, and caused said purchaser to be charged for more pounds of cheese than were actually delivered.

The evidence in proof of this overt act also appears in connection with the description of deliveries to ships, in this case to the S. S. *Cape Cumberland,* and the details appear at pages 72–74 of this brief, post.

The S. S. "William S. Clark" Incident

The evidence relating to the delivery of 45 cases of eggs to the S. S. *William S. Clark* on October 18, 1943, is discussed in appellants' brief on pages 46 to 49. They refer to it as an isolated incident and make a labored effort to discredit the evidence and to excuse the connection of Moncharsh with a palpable fraud which obviously was completely in furtherance of the conspiracy described in the indictment and proved by the evidence. The facts are these:

On January 29, 1943, Nye & Nissen received at their Los Angeles branch 105 cases of eggs which had been shipped to it from Minnesota. These eggs were thereupon placed in cold storage at the plant of the Terminal Refrigerating Company of Los Angeles for

the account of Nye & Nissen on February 10, 1943. They were given lot number 3737 and each case was stenciled or stamped with that number. In storing eggs it is customary to have them "processed," that is, treated with a coating of mineral oil to prevent or delay deterioration. These 105 cases of eggs, however, were "natural" eggs, that is, they were not so treated. Upon the receipt of these eggs for storage the Terminal Refrigerating Company issued its warehouse receipts to Nye & Nissen, and thereafter the eggs were subject to the orders of that company. (R. 2073–2084.)

On October 15, 1943, an order was received by the warehouse company from Nye & Nissen to ship these 105 cases to Nye & Nissen in San Francisco, and a bill of lading was thereupon issued to the California Freight Lines describing the shipment as 105 cases lot 3737 for shipment to San Francisco, and the shipment actually left Los Angeles on October 16, arriving in San Francisco the next day. (R. 2084–2085; Ex. 124, 125, 126, 130.)

On October 18, 1943, in pursuance of a purchase order issued by the American President Lines in behalf of the War Shipping Administration, 45 cases of these eggs, all bearing the lot number 3737, and therefore clearly identified as the eggs which had been in storage for over eight months, were delivered to the S. S. *William S. Clark,* and thereupon the invoice of Nye & Nissen was presented to the American President Lines as general agent for War Shipping Admin-

istration for 45 cases of medium processed AA eggs. This invoice (Ex. 112) is as follows:

INVOICE
NYE AND NISSEN, INC.
WHOLESALE DAIRY PRODUCE
1301 17th Street, San Francisco, Calif.

U. S. A. W. S. A.
c/o American Pres. Lines 10–18–43
General Agents
City

45 cases eggs, mediums, AA, proc., 1,350 at .58	783.00
20 boxes butter, 60# ea. AA, unsalted, 1,200 at .47¼	567.00
	1,350.00

H–8464
Str. William F. Clark
Pier #42

The S. S. *William S. Clark* was a new ship which had just been delivered to the Government and assigned to the management of American President Lines, and upon the stores being delivered to the steamship it started on a voyage to the Southwest Pacific, stopping in Australia, and then through the Suez Canal, the Mediterranean and the Atlantic, finally completing its voyage at Baltimore, Maryland, where it arrived in April 1944, a period of approximately six months. Fortunately, before proceeding on its voyage overseas, the vessel proceeded first to San Pedro and Long Beach, California, from which latter point it finally left on November 4, 1943. The chief cook on this vessel was a Negro by the name of Haffel H. Brown, and in his testimony he gave a picturesque description of the eggs in question. His testimony in that connection is quoted from pages 1722 and 1723 of the record:

Mr. Pratt:

Q. What did you observe about these eggs, Mr. Brown?

A. To be frank with you, the eggs, I will say this is my crew, I am just illustrating about these eggs. You order your eggs this way, that way, and the other way. I got five or six bowls there that I crack the eggs into before I take them over to the stove, to the frying pan, to see whether they are good, or not. I had a lot of trouble with them for the simple reason, why, a lot of them was very, very, very bad.

Q. In what respect were they very, very bad?

A. Rotten. To be frank with you, rotten.

Q. How about the odor from these eggs?

A. Some of them would run you out of there if you were in there, the way you could have smelled them.

Q. How long did that continue?

A. That continued until we got into Long Beach, Pedro, rather.

Q. How long a period of time was that from the time you first started to use these eggs until you got down to San Pedro, or Long Beach?

A. We got down there the latter part of October, because we left on November 4th.

Q. During that period of time how many of these cases of eggs did you open and examine?

A. Well, there was quite a few of them opened to try to get some good ones out of the bunch.

Q. Were you able to use some of the eggs that were in these cases?

A. Some I could use and some I couldn't, and they got so bad I just give up the sponge, told them I was going to get off.

On arrival at Long Beach complaint was made by one of the ship's officers to the American President Lines, and Mr. A. E. Fiske, its purchasing agent, called the defendant Moncharsh on the telephone and told him of the condition of the eggs and also of the butter which was part of the order, and requested that they be removed from the ship and other eggs and butter substituted. Moncharsh then notified the Los Angeles manager for Nye & Nissen, Frank Gartenberg, and the latter in company with Mr. A. G. Abell, an inspector of the United States Department of Agriculture, went aboard the ship at Long Beach and examined the eggs by candling. It was discovered by this examination that the inedible eggs were as much as two to every four to eight eggs examined, due to the presence of mold spots, mixed rots, or black rots. It further appeared from this examination that the eggs were plain or natural eggs and had not been "processed." (R. 2087–2099; 2027–2036.)

These eggs were further examined on the ship by candling by Mr. C. A. Wirth, Egg Standardization Supervisor for the California Department of Agriculture, Mr. H. W. Bradway, an inspector of the Agricultural Commissioner of Los Angeles County, and Mr. G. Wallace Rynerson, inspector of the United States Food and Drug Administration, on November 3, 1943. These experts worked together in the examination of the eggs. They opened 10 crates and examined half the eggs in each. Mr. Wirth testified that he personally examined 6 cases of eggs by candling 15 dozen in each case. He found no grade AA or grade A eggs, and his computation showed that

8.6% were inedible, 21% were grade B, and 69.5% were grade C. However, on account of the presence of inedible eggs the whole lot was entitled to no grade whatever. Mr. Bradway testified that all the cases of eggs on the ship, there being then 40 cases unopened and 1 case which had been broken, bore the stamped number 3737 with the name Nye & Nissen and the word "Medium" also stamped on the cases, but none bore any Government stamp. He also corroborated Mr. Wirth's testimony in regard to the condition of the eggs and further that they were plain, that is, natural eggs and not "processed." Mr. Rynerson also completely corroborated his two associates in regard to the examination of the eggs on the ship, and he further testified that on the following day he went to the premises of Nye & Nissen in Los Angeles and again examined 10 half crates of eggs, with the same results, namely, finding of numerous mixed rots, spot rots, black rots, moldy eggs, with the highest percentage of grade C eggs and with no grade AA or grade A. These witnesses were all experts and highly experienced from many years of inspection of eggs by candling. These witnesses all examined the condition of the chill box and found it satisfactory for the storage of eggs. (R. 1848–1859; 2010–2013; 1962–1974.)

After the foregoing examination, the witness Wirth, in his official capacity as an officer of the State of California, ordered the 40 full and 1 broken cases removed from the ship and waited while they were loaded onto a truck of the California Freight Lines. He then issued a formal notice to the driver of the

truck that the eggs were in violation of the Agricultural Code of California and directed that the truck be driven to the yard of California Freight Lines in Los Angeles. The following morning, November 4, 1943, Mr. Wirth went to that yard and instructed the freight office to contact Nye & Nissen's office to find out what they wanted done with the eggs. He stated that all the 41 cases were wooden cases, that all had the number 3737 stamped on them. Later, after a conference with Frank Gartenberg, local manager for Nye & Nissen, he issued a violation notice to Nye & Nissen and gave instructions that the eggs should be reconditioned within 24 hours. By reconditioning is meant recandling and regrading. This was done, and as a result 146½ dozen inedibles, namely, 1,758 eggs, were loaded onto a truck and taken to an incinerator. The balance of the eggs, being edible, were then released to Nye & Nissen. Witness further testified that from his examination he could tell the approximate age of these eggs, and he stated that they were approximately six to seven months old. After these eggs were removed from the ship they were replaced by Nye & Nissen with 40 cases of eggs which were then placed in the chill box and, according to the testimony of Haffel Brown, the cook, they were still being used when the ship landed at Baltimore six months later. This fact gives ample proof that the chill box in which the eggs were stored was in proper condition for the storage of eggs. (R. 1860–1861.)

Included with the objectionable shipment of eggs were 20 boxes of butter. The witness Haffel Brown

testified that the butter was rancid, and the witness Fiske, the purchasing agent for the American President Lines, testified to the same effect. The force and effect of this incident, however, relates principally to the fraudulent delivery and invoicing of the eggs.

A second feature of this incident relates to a report made by Frank Gartenberg, Los Angeles manager for Nye & Nissen, to the defendant Moncharsh. This consisted of a memorandum which was received in evidence in connection with Gartenberg's testimony as exhibit 137 and appears on pages 2101 and 2102 of the record and is as follows:

> Memorandum, Nye & Nissen, Inc., November 3, 1943
> To A. Moncharsh from Frank.
>
> DEAR ABE: I spent all morning at the harbor checking on the eggs and butter delivered to the *W. S. Clark* at San Francisco. I found the butter a bit rancid and some of it was O. K., but the eggs, I have candled three half-cases and found them to be from one and a half to two and a half dozen loss to the half case, and the good eggs were nothing but standards and trades. These eggs are part of the 105 cases that were shipped to you on October 14, Lot 3737, stored at the Terminal. They had not been candled and they were in the original cases, and the lot numbers stamped right on the cases. The steward of the ship was very much excited about the kind of eggs he got and stated that he certainly was glad that he was detained at Long Beach Harbor, which will give him a chance to change the eggs and butter. He also stated to me that he saw the same butter and

eggs on another ship which had left the harbor yesterday morning and that they had the same trouble. They had to break out nine hundred eggs to get five hundred. He told me that he had called in the Army and Navy inspectors and also a civilian inspector in Long Beach, who was along with the veterinarian. He did not know whether he was a state man. And they have all told him that these eggs were under grade eggs and had considerable loss in them and were not fit for them to go to sea.

Abe, you certainly should check in on this and see whose error it was to ship that kind of merchandise on a seagoing vessel, as after all these boys who are going out on these boats are risking their lives for us at home, and we certainly should see that they get the right kind of food, especially when they are paying for it. The butter and eggs were both kept under refrigeration, under a temperature of 38. The engineer of the ship made his report to that effect, and the steward said that he is making out a full report to the company.

[Signed] FRANK

The evidence whereby this incident was presented to the jury shows conclusively the connection of the defendant Moncharsh with the transaction involved. As the president and guiding head of the corporation, it was clearly within his functions to purchase large quantities of eggs as was done in this instance and to store such eggs for future handling and sale. His knowledge of the transaction was clearly demonstrated, and the whole episode reeks of deliberate and premeditated fraud and clearly and unequivocally was

a transaction completely in furtherance of the conspiracy described in the indictment.

The S. S. "Hawaiian Shipper" Incident

This incident and the evidence to prove it gave a telling demonstration of the pattern of fraud which permeated every transaction which, in the circumstances, was susceptible of proof. During the war period when ships were supplied with stores for a voyage lasting many months, specific instances of fraud rarely became provable from the very fact of the lapse of time and the consumption or destruction of the stores during the course of the voyage. But in the case of the S. S. *Hawaiian Shipper* there was a notable exception, and complete proof of fraud became available.

The S. S. *Hawaiian Shipper* was a troop carrier and carried 1,900 troops and a civilian crew of 86 besides a Navy gun crew of 43, a total of over 2,000 (R. 1498). It was managed for WSA by Matson Navigation Company, and for the ship's 13th voyage the Matson buyer issued a purchase order for delivery on December 5, 1944, of "400 cases of eggs, Fresh, Processed, Large, White, Procurement No. 1 or Consumer Grade A to specifications of WSA Food Control Regulation No. 14 (Ex. 74; R. 1342). The ship arrived at San Francisco from voyage 12 on November 29, 1944, and left on voyage 13 on December 16. A few cases of eggs remained in the ship's chill box at the end of voyage 12, and 10 cases were taken on as port stores before the 400 cases in question came on, and when voyage 13 started there were

4 or 5 cases left of the port stores. All of these eggs were purchased from Nye & Nissen (R. 1506–1507), and all were stored in the ship's large chill box which was kept between 34 and 36 degrees, the temperature being checked every hour during the voyage by the "reefer," the refrigerator inspector (R. 1509).

Within a day or two after the start of the 13th voyage the eggs remaining from the port stores were consumed and those provided for the voyage came into use. Then it was that discovery was made that the eggs were far below the grade ordered and for which the defendants had invoiced them. Specifically, it was testified by the ship's chief steward, Debes, the chief cook, Dolyn, and the chief baker, Oscarsson, that these eggs, in large part, were inedible, that is, were rotten and with a vile odor, and those that could be classed as edible had to be cooked with mace and nutmeg to cover up and conceal the odor and taste (R. 1596). Dolyn, the chief cook, testified that of every dozen of eggs he had to throw at least four and sometimes six or more into the garbage can, and this happened day after day (R. 1597, 1598).

The experience of Oscarsson, the chief baker, is expressed by him at pages 1547, 1548, and 1549 of the record as follows:

> Mr. Pratt:
>
> Q. Immediately after the voyage started, I will ask you if you found in breaking eggs that there was anything the matter with them?
>
> A. Yes. I think it was two days after we left.
>
> Q. What did you discover?

A. Oh, there was so many rotten eggs I couldn't use them.

Q. When the cases of eggs came to you, how many came at a time?

A. One case.

Q. One case. On the occasion you are speaking of, two or three days after the voyage started, tell just what you did when that case of eggs came to your bakeshop?

A. I got a case of eggs——

Mr. Faulkner. The same objection to this as made to Mr. Debes' testimony, on the same subject.

The Court. Overruled.

Mr. Faulkner. Exception.

The Court. You may answer. What happened on that day?

Mr. Pratt:

Q. What happened?

A. I got a case of eggs up.

The Court. Who got it up? You?

A. No, my helper.

Q. What time of day was this about?

A. It was nine o'clock in the morning.

Q. This was on the second or third day after you got out?

A. I think it was the second day out.

Q. All right. Tell this Jury what occurred at that time and place.

A. I opened that case. He couldn't break some eggs because he was busy carrying up stores, and I started to break a couple of eggs, and three or four were rotten right away. So I tried a few more again, and they wasn't so good. So finally we had some small regular

soup bowls, like they have on shore here for soup, so I got some of them, three or four, and I started to break one at a time. When we break them, it is too much trouble to do that, but I had to do it, so I started to break one or two eggs.

Mr. Pratt.

Q. Previously had you broken a lot of them in one bowl?

A. Yes.

Q. And what happened then when you did that on that occasion?

A. Well, I got too many rotten—the first egg I broke was rotten, see? And then I broke another one. Not so good. And then I broke another one. It was rotten. And then I had to get those bowls. And then I called the chief steward down, Mr. Debes.

Q. And you showed him the eggs?

A. I told him why——

Q. Never mind what you told him, Mr. Oscarsson. What did you do?

A. I say look at——

Q. What did you do and what did he do?

A. He looked at them and we broke some more. I think while he was there we broke about a dozen. He said, "I don't know what to do. You try to do the best of it."

Q. What did you do then?

A. I had to keep breaking them individual, one at a time, and I get—in some layer I didn't get more than three or four out of a layer, and out of some layers I get as high as ten.

Q. How many are in a layer?

A. There is three dozen in a layer.

In addition to the bad condition of the eggs as expressed by these witnesses, it further appeared that the cases were not full, that is, there were eggs missing from the layers and in many instances whole layers, each supposedly of three dozen, contained no eggs at all. (Oscarsson, R. 1552–1554; Dolyn, R. 1593; Debes, R. 1521, 1522.)

The foregoing account of the condition of these eggs together with the fact of the shortage above-mentioned should be contrasted with the invoice of the defendants, exhibit 87, which is as follows:

INVOICE

NYE AND NISSEN, INC.
WHOLESALE DAIRY PRODUCE
c/o Bank of America, California & Montgomery
San Francisco, 10, Calif.

U. S. A. W. S. A.
Matson Navigation Co. 12–5–44
General Agents
City

---

400 cs. eggs, large, proc. procurement #1 12,000 @ .595_____ 7,140.00
#89042
S. S. Hawaiian Shipper
Pier 32
Inspected by W. F. A.
" " U. S. V. C.

This incident is discussed in appellant's brief on pages 57 and 58, and a labored effort is made, with some misstatement of the evidence and its effect, to minimize its probative force. They seek to intimate that the eggs in question were on the Matson dock so long before being loaded that they had deteriorated from that fact, but the record fails entirely to bear out their assertions, as will be seen not only from the

testimony of the crew that loaded the supplies on the ship, the conditions on the covered dock, and the temperature on those days in December 1944, but the fact that the rottenness of the eggs was of a character that could not have developed in a few days even if conditions and weather had been adverse (Cooper, R. 2183; Stefani, R. 2190–2194; Norquist, Weather Bureau official, R. 3155; Dolyn, R. 1594).

Appellants also misrepresent the evidence. They speak of "missing layers of eggs in a few cases," whereas the testimony of Debes, Dolyn, and Oscarsson was to the effect that there were missing eggs throughout the entire shipment (R. 1522, 1552, 1594, 1595). Again, appellants say that "all the eggs were used during the voyage and one case of them was sold off ship while at Leyte." This is inaccurate. Not only were large quantities of these eggs consigned to the garbage and thrown overboard but, because of this, it became necessary to take on additional eggs at Leyte from another ship, and it was one of these cases that was sold to an officers' club at Leyte (R. 1535, 1541).

This whole incident, as completely demonstrated by the evidence, disclosed a deliberate and premeditated fraud on the Government, directly in furtherance of the conspiracy alleged in the first count of the indictment.

THE SUBSTANTIVE COUNTS 2 TO 7 AND THE EVIDENCE OF FRAUDULENT INVOICES

On pages 8 and 9 of appellants' brief there is a sufficient synopsis of the substantive counts 2 to 7 of the indictment.

In proving these counts the Government brought as witnesses the officers of the several steamship companies which, as agents for WSA, operated the vessels to which deliveries of eggs, cheese, and butter were made by the defendants. These officers produced the original purchase orders issued to Nye & Nissen and also the original invoices issued by Nye & Nissen, claiming payment from WSA for the purchase price of the products. They also proved by proper documents that all these invoices were paid with Government funds.

It is the falsity of these several invoices that is the basis of the charge in each of these counts that the defendants presented a false claim against the Government in violation of Section 80, Title 28, U. S. C. These offenses were all committed during the months of April and May 1944, and the evidence of the defendants' fraudulent conduct was secured by actual examination and inspection of eggs (and in a few instances of cheese) at the time of or immediately after delivery to the ships. This was accomplished by agents of the Federal Bureau of Investigation with the assistance of Army experts and without the knowledge of the defendants.

The procedure of the investigating officers was this: They secured the cooperation of Nystrom, a truck driver for Nye & Nissen who informed the FBI when he was about to make a delivery to the waterfront.[5]

[5] Delivery to the S. S. *Cape Breton* was made by truck driver Ranson; the evidence does not disclose who made delivery to the S. S. *James Oliver*, which was after Nystrom had left the employ of Nye & Nissen.

Thereupon one of both of the FBI agents Magee and Johnson went at once to the ship where delivery was made and took with them an officer of the Army Veterinary Corps who was skilled in the inspection of eggs by candling. These officers were Major Milton R. Evans and Lieutenant Colonel Pearl H. Hand. At the ship in each instance they secured from the ship's steward his copy of the Nye & Nissen invoice which accompanied delivery of the products, and thereupon the Army officer examined the eggs by candling sufficient samples to determine the grade and size of the whole lot. Also, in some instances, the cheese was weighed. In every instance it was determined by these expert methods that the eggs were far below the grade or size of the eggs described in the invoices, in some instances were so deficient as to be of no grade and therefore unsalable under WSA regulations, and in all instances were of much less value than the prices named in the invoices. Thus was disclosed a course of fraudulent conduct which not only established the defendants' guilt of the offenses charged in counts 2 to 7 but which was in furtherance of the conspiracy and, further, these transactions constituted overt acts in the consummation of the purposes of the conspiracy.

Besides the six ships mentioned in counts 2 to 7, the evidence gives the details of visits by these FBI agents and the Army inspectors to nine other ships where they made the same kind of investigations. The results on these ships were the same, namely, clear evidence of the inferior quality of products delivered

by Nye & Nissen and the issue in each instance of a false invoice by the defendants. These were offered and received in evidence as similar transactions in establishing the fraudulent purpose and intent of the defendants and also as additional overt acts committed by them in furtherance of the conspiracy.

Oscar Nystrom was employed as a truck driver by Nye & Nissen from January 1944 until about May 15 of the same year. In the morning of every day he made deliveries to two stores in San Francisco maintained by Nye & Nissen, following which he made two or three deliveries a day of eggs, butter, and cheese to ships at the waterfront. His instructions all came usually from the defendant Berman, but at times from the defendant Goddard, who told him what articles to load on his truck and where to deliver them and gave him invoices which accompanied the deliveries (R. 2450–2452).

Beginning with the delivery of eggs to the S. S. John Muir on April 24, 1944, he notified FBI agents Magee or Johnson at the time of all deliveries to WSA ships and made a note of the exact time of the deliveries and the names of the ships (R. 2494). His first contact with the FBI, as testified by Agent Magee, was on April 21 or 22, 1944 (R. 2857).

As briefly as possible, the evidence establishing these transactions was as follows, giving first, in their order, those involving the substantive counts, 2 to 7, then the two which prove two of the overt acts alleged in count 1, following which are the details relating to other ships:

S. S. "Cape Charles" (count 2)

The evidence relating to this ship gives complete proof of the second count of the indictment. This includes, as in each of the substantive counts, proof of the general agency operating contract between the WSA and the steamship company to which the ship was assigned and all the other formal allegations contained in paragraphs 2 to 5 of each of these counts. The sufficiency of this proof is not questioned and the details are therefore omitted.

The false invoice in this case upon which the violation of Section 80, Title 18, U. S. C., is predicated is exhibit 94. This invoice is dated April 29, 1944, is addressed to "USA, WSA, Agwilines, Interocean S. S. Co., General Agents," in the sum of $789.18, for the delivery of three cases of Cheddar cheese, 240 pounds at $0.287 per pound, $68.88; and 36 cases of eggs, medium processed AA, 1,080 dozen at $0.41 per dozen, $442.80; to be delivered, pursuant to Agwilines, Inc. purchase order No. CHAR–60, to the S. S. *Cape Charles* at Pier 18.

Nystrom loaded his truck for this shipment on April 29, 1944, under the supervision of Berman, who gave him several copies of the invoice which, with the truckload of products were delivered to the ship at Pier 18, San Francisco. On his return to the plant he handed Berman the receipt showing the delivery. At the time of this delivery he notified the FBI agents of that fact (R. 2494–2503), and on the same day Agents Magee and Johnson, accompanied by Major Evans, went aboard the ship. They

found the 36 cases of eggs still on the deck and the cheese and butter in the dairy box under refrigeration. Agent Johnson weighed the cheese and found it had a net weight of 149 pounds, which was 91 pounds short of the invoiced weight of 240 pounds (R. 2995).

Of the 36 cases of eggs, 32 bore the USDA inspection stamp and 4 cases bore no stamp. Samples of the eggs were candled by Major Evans in a dark room arranged in a shelter on deck. In this examination he candled and weighed 3 unstamped cases and 1 stamped case and weighed an additional stamped case. The result was as follows:

> Case 1: Unstamped; contained 41% Grade AA, 35% A, 16% B, 2% C, 2% Small Blood Spots, 3% Checks, 1% Inedible. Owing to the inedible eggs the case could be given no grade, but eliminating consideration of the latter, the eggs graded Grade B. Witness weighed the eggs in case 1 and found the net weight was 34 pounds 14 ounces, which brought them barely within the classification of U. S. Small, being 5 pounds and 2 ounces short of the weight required for U. S. Medium.
>
> Case 2: Unstamped; contained 14% Grade AA, 36% A, 35% B, 12% C, and 3% Inedible. This gave them no grade on account of the inedible eggs; otherwise they would grade U. S. Consumer Grade B. Net weight was 33 pounds 4 ounces, which classified them as peewees.
>
> Case 3: Unstamped; contained 44% Grade AA, 33% A, 18% B, 3% C, and 2% Checks. This graded U. S. Consumer Grade B. The

net weight was 33 pounds 10 ounces, classifying them as peewees.

Case 4: Stamped; stamp dated April 27, 1944; contained 73% Grade AA, 21% A, 4% B, 1% Small Blood Spot, 1% Check. The eggs graded U. S. Consumer Grade A.

Case 5: Stamped; was not candled, but weighed 40 pounds and 4 ounces, which is Medium. (R. 2642–2658.)

From the foregoing it clearly appears that the invoice was false and fraudulent both in the weight of the cheese and the grade and size of the eggs. All the circumstances attending the delivery of inferior products in this and numerous other similar instances point inescapably to the deliberate fraudulent intent and purpose of the defendants in the use and presentation to WSA of the false invoice described in count 2.

S. S. "Mission San Diego" (count 3)

As stated in the synopsis of evidence relating to count 2, we are omitting statement of the evidence which established the formal allegations of the indictment as to count 3 and we are giving herewith only the evidence which clearly establishes the fraudulent character of the Nye & Nissen invoice upon which the violation of Section 80 is based. This false invoice is exhibit 153, is dated May 10, 1944, and is addressed to USA, WSA, Deconhil S. S. Co., General Agents, in the sum of $307.07, for the delivery of 10 cases of eggs, medium processed AA, 300 dozen at $0.41 per dozen, $123.00; one case Romano Dolce cheese, 65 pounds at $0.40 per pound, $26.00; and one case of

Cheddar loaf cheese, 30 pounds at $0.295 per pound, $8.85; to be delivered pursuant to Deconhil Shipping Company purchase order No. 1124 S to the S. S. *Mission San Diego,* Oakland, California.

Nystrom testified that on the same date he prepared the above shipment for delivery under Berman's supervision and delivered it at the Amship Pier, Oakland, California. He identified the invoice as being one of a number which were given him by Berman to accompany the delivery to the ship. When he returned he delivered to Berman a receipt secured at the ship (R. 2521–2523).

The next day, May 11, 1944, FBI Agents Magee and Johnson, accompanied by Major Evans, visited the ship. There they saw a copy of the Nye & Nissen invoice and checked the products described therein, all of which were in the chill box. They found 10 cases of eggs which bore the Nye & Nissen label, none of which had the USDA inspection stamp on them, but all the labels bore the notation "Medium Grade A" appearing to be put on by a rubber stamp. Agent Magee weighed the cheese and found that the Romano Dolce cheese described in the invoice as 65 pounds weighed net 57 pounds and 13 ounces. The case of Cheddar loaf cheese invoiced at 30 pounds weighed 24 pounds and 7 ounces (R. 2886–2891).

Of the 10 cases of eggs, Major Evans examined, by candling and weighing, 2 cases, with the following result:

> Case 1: Contained 60% Grade A, 18% B, 1% C, 11% U. S. Light Dirties, 3% U. S.

Dirties, 1% Checks. Net weight was 38 pounds 14 ounces. Grade of case was U. S. B Small.

Case 2: Contained 68% Grade A, 27% B, 4% C, 3% Light Dirties, 2% U. S. Dirties, 1% Inedible.

There were no AA eggs in either case. The whole lot of 10 cases was given a grade of B small, although on account of the inedible eggs it was entitled to no grade. The invoice described 10 cases of medium *processed* AA eggs, but Major Evans reported that the eggs were plain eggs and not processed (R. 2697–2700).

From the foregoing it plainly and emphatically appears that the invoice in this case was fraudulent, as alleged in the indictment, and taken in connection with the testimony of Pineda, Andrade, Nystrom, and the girl candlers, it is completely proved that this violation of law was committed by the defendants with deliberation and fraudulent intent.

S. S. "Francis W. Parker" (count 4)

Again the evidence relating to these transactions emphatically proves all the allegations of the fourth count of the indictment. The Nye & Nissen invoice (Ex. 102) is dated May 9, 1944, is addressed to USA, WSA, Alaska Packers Association, in the sum of $996.87, for the delivery of 45 cases of eggs, medium processed AA, 1,350 dozen at $0.41 per dozen, $553.50; to be delivered, pursuant to Alaska Packers Association purchase order No. 2906, to the S. S. *Francis W. Parker* at Pier 41. Nystrom testified to delivering these eggs with certain butter and cheese to the S. S.

Francis W. Parker at Pier 41, San Francisco, on May 9, 1944. He identified the invoice exhibit 102 which with other copies of the same paper he received from Berman. He also identified exhibit 104, the delivery slip in Berman's handwriting which was signed by the steward of the ship and returned to Berman (R. 2518–2520).

Kemmerle, the chief steward on this ship, also identified the Nye & Nissen invoice and also the receipt exhibit 104 which bore his signature. He stated that within an hour after the eggs were delivered to the pier the Government officers arrived on the scene and he assisted in carrying five cases of the eggs to his cabin on the ship where they were candled by Major Evans (R. 1668–1674).

FBI Agent Johnson testified that he boarded this ship on May 9, 1944, in company with Major Evans and FBI Agent Ellis, at Pier 41. Of the 45 cases of eggs, 38 bore the inspection stamp of the USDA, the other 7 bearing no such stamp. The eggs were first seen on the pier and later were loaded on the ship. Mr. Johnson and Major Evans weighed 11 cases, 4 of which bore the stamp and 7 did not. The stamped cases all weighed slightly less than the 40-pound minimum for medium eggs. The unstamped cases varied in weight from 32 pounds 8 ounces (peewee) to 35 pounds 6 ounces (small) (R. 3021–3023).

Major Evans testified to his having candled four cases in the steward's cabin, all of which bore the USDA inspection stamp. Three of these cases graded A small and the other B small. On the basis of the

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examination and weighing of the several cases, the whole shipment of eggs was determined to be U. S. Grade B Small (R. 2692–2697).

In connection with his testimony, FBI Agent Johnson identified and there were offered in evidence three eggs out of one of the unstamped cases. These were very small eggs and were produced by Mr. Johnson in a small carton. He stated that this carton had not been on the ship but it was used as a convenience in bringing the eggs into court. Defendants' counsel, Mr. Faulkner, at this point made a great to-do about this small carton because it bore the words "Large Grade A Eggs." He objected to the eggs, which were obviously small eggs, being brought into the presence of the jury in this carton and assigned it as misconduct, charging that Government counsel had deliberately picked a Nye & Nissen carton marked "Large Eggs" in bringing these small eggs so as to make some sort of impression on the jury (R. 3024). Mr. Pratt replied that there was no justification for any such remarks; that the Government was not bringing in the container for any purpose in the case; that the Government did not want to have anything in the case not absolutely proper and aboveboard, and resented the implication of defense counsel's remarks that the Government was deliberately doing something for the purpose of deceiving. Mr. Faulkner repeated his charge of misconduct. The Court thereupon directed the jury to disregard the remarks of counsel on both sides and stated (R. 3026) that the eggs were received in evidence and the carton was to be dispensed

with, with the assistance of the clerk. Mr. Pratt then called the Court's attention to the fact that the only indication of what appeared on this carton came from counsel for defendants reading what was on it, the jury not having had possession of it or an opportunity to see what was on it. The Court then repeated that the eggs would be admitted in evidence, and in a jocular tone suggested care in handling these eggs, which were then about two years old (R. 3025, 3026). It then appeared (R. 3028) that the three eggs, having been placed in another container, were exhibited to the jury. Thus this tempest in a teapot was at an end.

In appellants' brief under point IV B, this episode is alleged as misconduct and is argued beginning at the bottom of page 108 of their brief. This will be later referred to and answered in this brief.

S. S. "Gilbert Hitchcock" (count 5)

The allegations in the fifth count of the indictment are completely proved by the evidence.

The false invoice upon which the violation of Section 80 is based is exhibit 144. It is addressed to USA, WSA, Alaska Transportation Company, General Agents, is dated May 1, 1944, for the sum of $1,478.42, for the delivery of 55 cases of eggs, medium processed AA, 1,650 dozen at $0.41 per dozen, $676.50; and 2 cases of Cheddar trips, 160 pounds at $0.287 per pound, $45.92; to be delivered, pursuant to Alaska Transportation Company purchase order No. H 8, to the S. S. *Gilbert Hitchcock,* Pier 23.

Nystrom received these products from Berman and Goddard, loaded them on his truck, and delivered them on May 1, 1944, to the above ship at Pier 23, San Francisco. (R. 2507–2509.) Shortly thereafter and while the products were still on the pier, FBI Agent Johnson and Major Evans arrived. After they were loaded on the ship Major Evans examined the eggs by candling and weighing, and Agent Johnson weighed the cheese. Of the 55 cases of eggs, 41 bore the USDA inspection stamp and 14 bore no stamp, although all bore the Nye & Nissen green label denoting medium weight eggs.

In weighing the cheese it was found that it weighed 12 pounds and 2 ounces short of the invoiced weight (R. 2994).

In examining the 14 unstamped cases of eggs two cards were found on the top layer of the eggs (Ex. 39 and 40). One of these cases bore the penciled notation "candled pullets" and the other the word "pullets." This comports with the testimony of Pineda who testified that such cards were customarily placed in cases of pullets or peewees by the girl candlers (R. 508–511).

Upon candling 100 eggs in each of 6 cases Major Evans reached the following conclusions:

> Case 1: Not stamped; when top was removed from case a penciled card with the word "pullets" was found, admitted in evidence as exhibit 39. The eggs were not processed, and graded as follows: 6% Grade AA, 51% A, 35% B, 6% C, 2% Inedible; entitled to no grade because of the inedibles; otherwise would grade

U. S. Consumer Grade B. Net weight of case was 33 pounds 12 ounces, thus classified as pewees.

Case 2: No stamp; penciled on the lid was the word "pullets." The eggs were not processed. They graded as follows: 11% AA, 58% A, 27% B, 3% C, 1% Inedible Mixed Rot. No grade on account of the inedibles; otherwise would be grade B. Net weight 34 pounds 2 ounces; classified as small, being 5 pounds and 14 ounces short of medium.

Case 3: Stamped; 29% AA, 42% A, 24% B, 2% Checks, 1% Small Meat Spot, 2% Inedible Mixed Rots; no grade on account of inedibles; otherwise grade B. This case was all brown eggs, therefore difficult to candle.

Case 4: Stamped; 60% AA, 26% A, 12% B, 1% C, 1% Checks; case Grade A; weight 39 pounds and 12 ounces, being 4 ounces under minimum medium weight.

Case 5: No stamp; not processed; 36% AA, 36% A, 24% B, 1% Checks, 3% Inedible; no grade because of inedibles; otherwise grade B; net weight 33 pounds and 12 ounces; classified as pewees.

Case 6: Stamped; 65% AA, 20% A, 6% B, 3% C, 5% Checks, 1% Inedibles; no grade on account of inedibles; otherwise grade A; weight 38 pounds; classified as small. (R. 2660–2673; 2985–2994.)

The fraudulent character of the invoice in this case is too obvious to require further comment. By clear implication, it connects Moncharsh with the offense in that Pineda testified that the operations of the plant, including the candling of eggs, were under the con-

stant supervision of Moncharsh (R. 446, 460, 461, 466, 471), noting also that he stated unequivocally to Agents Magee and Johnson on September 1, 1944, that he knew and was familiar with all the types of eggs delivered out of the Nye & Nissen plant (R. 4339, 4340). This same observation applies to all shipments of eggs delivered to the several ships.

S. S. "Czechoslovakia Victory" (count 6)

The allegation in the sixth count that the defendants submitted a false invoice to the Government is clearly established. This invoice (Ex. 151) was dated May 3, 1944, and addressed to USA, WSA, American-Hawaiian S. S. Co., General Agents, in the sum of $251.25, for the delivery of 25 cases of eggs, medium A, 750 dozen at $0.335 per dozen, $251.25; to be delivered pursuant to American-Hawaiian Steamship Company purchase order No. 922, to the S. S. *Czechoslovakia Victory*. Nystrom testified to the delivery of these products at Pier 2, Alameda, California, together with copies of the invoice given to him by Berman, one of which was returned to Berman after being receipted for at the ship (R. 2511). FBI Agent Johnson and Major Evans visited the ship on May 5, 1944. They identified the 25 cases of eggs in the ship's chill box. None of these cases bore the USDA inspection stamp but all bore the Nye & Nissen label with a rubber stamp in purple ink reading "Medium Grade A." To determine the grade and weight, 3 cases of eggs were examined. Major Evans testified

that his examination by candling and weighing these 3 cases was as follows:

> Case 1: Inspection showed 18% A, 47% B, 23% C, 3% U. S. Dirties, 3% Checks, 6% Inedibles. The inedibles in this case consisted of 4 mixed rots and 2 stuck yolks, indicating that they were storage eggs. Net weight 38 pounds 12 ounces, grading U. S. Grade C Small.
>
> Case 2: Inspection showed 23% A, 52% B, 22% C, 2% Inedibles, the latter consisting of stuck yolks, again indicating storage eggs; net weight 38 pounds 12 ounces, grading U. S. Grade C Small.
>
> Case 3: Inspection showed 45% B, 45% C, 10% Inedibles. In this case there were no AA and no A eggs. Disregarding the inedibles the case graded C (R. 2681–2687).

While it appears that these eggs were delivered to the ship on May 3 and not examined by the Government officers until May 5, it is to be noted that the witness Hanson, who supervised the loading of the ship, testified that the eggs were loaded into the chill box of the ship immediately upon delivery at the pier (R. 2306).

S. S. "Henry White" (count 7)

The evidence relating to this ship completely proves the allegation of the seventh count of the indictment. The invoice involved is exhibit 53, issued by Nye & Nissen on May 3, 1944, and directed to USA, WSA, De La Rama S. S. Co., General Agents, in the sum of $1,263.56, for the delivery of 50 cases of eggs,

medium processed AA, 1,500 dozen at $0.41 per dozen, $615.00; to be delivered pursuant to The De La Rama Steamship Co., Inc., purchase order No. 3601, to the S. S. *Henry White* at the Howard Terminal, Oakland, California.

Nystrom delivered these products to the ship on May 3, 1944, at the Howard Terminal, by direction of Berman (R. 2505, 2506).

Upon being advised of this delivery FBI Agents Magee and Johnson, in company with Colonel Hand of the Army, boarded the ship, which was new and preparing to sail on her first voyage. These officers found the 50 cases of eggs all bearing Nye & Nissen labels in the ship's chill box, and it was observed that 42 of these cases bore the stamp of the USDA inspection and 8 cases were unstamped. In examining these unstamped cases, Agent Magee removed three small cards, two of which were marked in pencil with the word "pullet" and one with the word "peewee." (Ex. 36, 37, 38; R. 2884, 2885.) Agent Johnson weighed the 8 unstamped cases and found that 6 of them had a net weight each of less than 34 pounds, denoting that they were peewee. The other 2 each weighed slighly over 34 pounds and, therefore, were classified as small.

Colonel Hand testified in detail to his examination of these eggs by candling. He candled 100 eggs in each of five cases, four of which bore the USDA stamp, the other being unstamped. The result of this examination was that no grade was given to any of the five cases because of rots and inedible eggs, but

excluding this feature all the eggs graded either B or C. (R. 549–574.)

The Government also produced as a witness Van Winkle, who was chief steward of this ship on its first voyage. He testified that shortly after the ship had started on this voyage he made an examination of a number of cases of eggs in the chill box and found that they were very small, being described by him as peewee eggs. He also examined some of the eggs in the galley and found that the first two or three rows on the top of every case were of fairly good size and after that they got down to peewee eggs (R. 2365–2375).

The fraudulent character of the invoice described in the seventh count has thus been abundantly proved.

S. S. "Cape Breton" (overt act D, count 1)

Overt act D of count 1, as alleged in the indictment, reads as follows:

> D. On or about the 10th day of May 1944, defendant Ruby Jutland Goddard caused forty-five cases of eggs to be sold to the United States of America—War Shipping Administration, Matson Navigation Co., General Agent, and to be delivered to the Steamship *Cape Breton* at Pier 30 in the City and County of San Francisco, State of California, which eggs were of a lesser grade, weight, and price than that represented to said purchaser.

On May 10, 1944, Nye & Nissen issued its invoice directed to USA, WSA, Matson Navigation Company, General Agents, for $778.01 for the following prod-

ucts: 45 cases eggs, processed, medium AA; 420 pounds butter; 84 pounds California loaf cheese; 20 pounds cheese, grated; 63 pounds Romano Dolce cheese. The products named in the invoice were delivered at the Matson Pier 30 by Charles Ranson, a truck driver then working for Nye & Nissen. Goddard ordered Ranson to make this delivery and designated the eggs which were to be loaded. Goddard first brought to him a flat of eggs, and then on a hand truck brought him 10 additional cases of eggs, telling him to mix these with the other cases. Ranson noticed that the cases on the flat had the USDA inspection stamp on them, marked grade AA eggs. The 10 cases brought by Goddard on the hand truck bore no USDA stamp, but had a purple "P" stamped on the end. When Ranson started to load the latter eggs he noticed they were appreciably lighter in weight, and he made the remark to Goddard that he did not like to deliver such light weight eggs. Goddard replied "It's all right. Go ahead and load those." In response to Goddard's instructions he mixed the light cases with the others in loading his truck. Goddard also gave him at the same time several copies of the Nye & Nissen invoice, together with a delivery receipt, all of which accompanied the load (R. 1393–1399).

On this same day, May 10, 1944, FBI Agent Johnson saw the eggs and other products at the Matson Pier 30 in San Francisco. He was alone at the time and he placed identifying marks on some of the containers. The next day, May 11, 1944, this merchandise having been moved to Pier 15, Agent Johnson, accompanied

by Major Evans, went to Pier 15 and, having identified the various containers, made an examination. Of the 45 cases of eggs, 36 bore the USDA inspection stamp and 9 cases were unstamped, the latter all bearing the purple "P." These 9 cases were weighed by Agent Johnson, and he found that 3 of them weighed, respectively, 34 pounds, 36 pounds, and 34 pounds 4 ounces, thus being classified as light. The other 7 cases all weighed less than 34 pounds and were classified as peewees (R. 3028–3033).

Agent Johnson also weighed cheese which bore the Nye & Nissen label. The California loaf cheese which was invoiced at 84 pounds had an actual weight of 77 pounds and 7 ounces. This was labeled "Cheddar Cheese—Mendocino." He also weighed the Romano Dolce cheese which was invoiced at 63 pounds. The net weight was 53 pounds and 14 ounces (R. 3034, 3035).

Major Evans confirmed the testimony of Mr. Johnson as to the number of stamped and unstamped cases of eggs and that they all bore the Nye & Nissen label. He examined four cases of eggs by candling, two of which bore the USDA inspection stamp and two having no such stamp. The result of his inspection was as follows:

> Case 1: Stamped; indications were found in this case that the eggs were storage eggs. By candling they graded 12% AA, 44% A, 18% B, 2% C, 1% Blood Spots, 1% Checks, 2% Inedibles, one of which was a moldy egg with mold in the interior of the shell, and the other was a white rot. The mold is a condition that

develops in storage and takes a long time to develop, probably two months or more. Aside from the inedibles, this case graded A.

Case 2: No USDA stamp but purple "P" on label; candling showed 72% AA, 18% A, 3% B, 2% C, 1% Blood Spots, 2% Checks, 2% Inedibles, that is Blood Rots. Net weight 35 pounds 8 ounces; grade of case A Small.

Case 3: Bore USDA inspection stamp. Inspection showed 56% AA, 30% A, 11% B, 1% Blood Spots, 2% Checks; weight 39 pounds 14 ounces; grade of case A Small.

Case 4: Bore USDA inspection stamp; inspection showed 43% AA, 39% A, 14% B, 1% Meat Spots, 2% Checks, 1% Inedibles. Weight was 39 pounds 12 ounces; case graded A Small.

Major Evans graded the whole lot of eggs, disregarding the inedibles, as A small.

From the foregoing it will be seen that the allegations of overt act D of count 1 are definitely proved.

S. S. "Cape Cumberland" (overt act E, count 1)

Overt Act E of count 1, as alleged in the indictment, reads as follows:

> E. On or about the 10th day of May 1944, defendant Henry Eugene Berman, at the San Francisco plant of defendant Nye & Nissen, a corporation, scraped weights off of four cases of California loaf cheese and caused said cheese to be sold to the United States of America—War Shipping Administration, Moore-McCormack Steamship Co., General Agent, and to be

delivered to the Steamship *Cape Cumberland* at Berth 6, Outer Harbor, City of Oakland, State of California, and caused said purchaser to be charged for more pounds of cheese than were actually delivered.

On May 10, 1944, Nye & Nissen issued its invoice directed to USA, WSA, Moore-McCormack Steamship Co., General Agent, in the amount of $564.04, for certain eggs, butter, and cheese delivered to the S. S. *Cape Cumberland,* Berth 6, Outer Harbor, Oakland, California (Ex. 140). The significant evidence connected with this transaction relates only to the fact that the weights were scraped off the four cases of California loaf cheese, the weight of the cheese being misrepresented on the invoice so that the Government was defrauded.

Nystrom recalled the preparation of this shipment for delivery to the ship and observed that Berman and Robinson, a truck driver for Nye & Nissen, scraped the weights off the wooden boxes of Cheddar loaf cheese included in the order and described in the invoice. This was on May 10, 1944. (R. 2524–2526.)

On the following day, May 11, 1944, FBI Agents Magee and Johnson, with Major Evans, visited the S. S. *Cape Cumberland* at Berth C, Outer Harbor, Oakland, and weighed the cheese described in the invoice, a copy of which was available to them at the ship. Mr. Magee testified that four cases of cheese labeled "California Cheddar Loaf Cheese, Factory No. 1621, Nye & Nissen, SF" were observed on the ship. These were invoiced at 120 pounds, and the

actual weights as determined by the Government officers were as follows:

Case 1	26 pounds, 4 ounces
Case 2	26 pounds, 8 ounces
Case 3	25 pounds, 5 ounces
Case 4	26 pounds, 5 ounces
Total weight	104 pounds, 6 ounces

It thus appears specifically and clearly that there was a reason for scraping the weights off the boxes, namely, to deceive the receiving clerk or steward of the ship and thus to avoid detection of the fraud in the invoice. Clearly the allegation of overt act E of the first count was proved.

S. S. "John Muir"

On April 24, 1944, Nystrom, truck driver for Nye & Nissen, delivered to this ship at the Naval Supply Depot, Oakland, 48 cases of eggs together with the Nye & Nissen invoice directed to United States of America, War Shipping Administration, Alaska Packers Association, General Agents. This invoice, also dated April 24, 1944, was for $1,292.91 in payment for products including "48 cases Medium Processed AA Eggs" (Ex. 65).

Nystrom assembled the truckload under Berman's direction, and the latter instructed him to load 38 cases bearing the USDA inspection stamps and to mix with these on his truck 10 cases secured from Goddard which bore no official stamp but had a large purple "P" on the labels. He heard Goddard suggest the inclusion of these 10 cases, and in lifting them he noticed that they were substantially lighter in weight (R. 2462–2474).

On the same day, having been advised of this delivery by Nystrom, FBI Agent Magee, accompanied by Colonel Hand of the Army, boarded the ship and found 48 cases of eggs in the chill box with the same markings described by Nystrom. Sample labels of both stamped and unstamped cases are in evidence as exhibits 67 and 68, which show the purple "P" on one and the USDA stamp indicating grade AA on the other. Colonel Hand candled 3 cases of the peewees and 2 of the other 38. The former were graded B although they contained rots, checks, and dirties. The latter could be given no grade on account of 5% rots. Otherwise they graded C. The 3 cases of peewees weighed less than 28 pounds per case, the minimum weight for medium eggs being 40 pounds (R. 590–597; 2859–2865).

Mahoney, mess man on this ship, testified that on this voyage he observed the eggs both in the galley and when being served and that many were inedible and rotten (R. 1641–1656).

S. S. "Josiah Royce"

On April 25, 1944, Nystrom, truck driver for Nye & Nissen, delivered to this ship at the Outer Harbor, Oakland, 60 cases of eggs, together with the Nye & Nissen invoice directed to USA, WSA, Isbrandtsen Steamship Corporation, General Steamship Corporation. This invoice, also dated April 25, 1944, was for $1,427.82 in payment for products including "60 cases Large Processed Grade AA eggs" (Ex. 61).

By instructions of Berman, the truck was loaded the evening before the delivery. On instructions of

Berman, Nystrom loaded 50 cases of eggs bearing the USDA stamp and 10 cases received from Goddard which bore no stamp but had a purple "P" on the label. Delivery was made to the ship at about 8:30 in the morning, and while the eggs were being unloaded the steward of the ship segregated the 10 cases bearing the letter "P," removing the tops, and rejected these 10 cases. Nystrom thus saw the eggs and testified that they were very small, saying "I would say the size of a pigeon egg or a little larger than my ring here." On instructions from the steward, he returned these 10 cases to the Nye & Niseen plant. Other eggs were sent to the ship to replace them (R. 2475–2486).

On the same day, having been advised of this delivery by Nystrom, FBI Agent Magee, accompanied by Colonel Hand, boarded the ship and secured a copy of the invoice exhibit 61, which called for 60 cases large AA eggs. They found 50 cases in the chill box and 10 cases on the pier. The latter were examined and found to be very small eggs. Colonel Hand candled 4 cases of these eggs and thereby determined that they were entitled to no grade because there were 2.7% inedible rotten eggs (R. 585–590). Both Magee and Hand corroborated the markings on these cases. Regardless of the size of the eggs, they failed entirely to meet the specifications contained in the invoice, which was obviously fraudulent.

S. S. "Cape Pillar"

On April 26, 1944, Berman directed Nystrom to load 45 cases of eggs for this ship, to be delivered

at Pier 34, San Francisco. These 45 cases consisted of 35 cases stamped with the USDA inspection stamp and the 10 cases marked with the purple "P" which had been rejected by the S. S. *Josiah Royce* the previous day and were still segregated on the floor of the warehouse. Berman warned Nystrom to avoid the trouble he encountered on that occasion and to mix them upon his truck. He carried with him the Nye & Nissen invoice (Ex. 57) dated April 25, 1944, for $563.30, describing "45 cases Medium Processed AA eggs" (R. 2491–2493).

On the same day FBI Agents Magee and Johnson, accompanied by Colonel Hand, boarded the ship. They confirmed the markings on the 45 cases of eggs. The 10 unstamped cases were weighed and proved to be peewee or pullet eggs. Colonel Hand candled 3 cases of the eggs bearing the USDA stamp and graded them as "Small, Grade B." Exhibit 59 is a box containing 9 eggs from one of the unstamped cases and demonstrates the small size of these eggs. The fraudulent character of the invoice was thus established (R. 574–585; 2871–2876).

S. S. "Phillipa"

The evidence relating to this transaction establishes the fact that the invoice of Nye & Nissen (Ex. 84) was dated May 3, 1944, and describes 65 cases medium AA eggs, with a quantity of butter and cheese, delivered to the S. S. *Phillipa* at Pier 30, San Francisco. The invoice is addressed to USA, WSA, Matson Navigation Company, General Agent.

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Nystrom testified to the delivery of these products at Pier 30 (R. 2512–2514). On May 5, 1944, FBI Agent Johnson, with Major Evans, visited the ship. They found the 65 cases of eggs bearing the Nye & Nissen label in the ship's chill box, 50 of which bore the USDA inspection stamp and 15 bore no such stamp. Major Evans examined 6 cases by candling, 2 being unstamped cases and 4 bearing the USDA stamp. A seventh unstamped case was weighed. Of the unstamped cases, Major Evans testified that one graded B small, the weight being 34 pounds and 2 ounces, and the other graded A small, weighing 34 pounds 12 ounces. In the latter case a card (Ex. 41) with the penciled word "peewee" was found. The 4 stamped cases all contained many inferior eggs, and 3 of them graded A medium and the fourth B medium (R. 2674–2680). The unstamped case which was weighed but not candled weighed 33 pounds and 12 ounces, thus being classified as peewee.

The finding of the peewee card in one of these cases corroborates the testimony of Pineda that such cards were placed in cases of peewees by the girl candlers (R. 508–511).

It further appears from Nystrom's testimony that he identified exhibit 77, which was a form of receipt in Goddard's handwriting which Nystrom carried to the ship when he delivered the load and secured thereon the signature of the receiving clerk at the Matson Pier.

This transaction and the evidence sustaining it are in line with what occurred in connection with other

ships, and this evidence was offered and received by the Court both as a similar transaction to prove the knowledge and intent of the defendants in the substantive counts and also as an overt act in furtherance of the conspiracy described in the first count.

S. S. "William A. Coulter"

The evidence relating to this transaction is in exactly similar trend to those previously described. The false invoice is exhibit 169 and is addressed by Nye & Nissen to USA, WSA, Hammond Shipping Company, General Agent. It is dated May 8, 1944, and among other products describes 40 cases medium processed AA eggs, 1,200 dozen at 41 cents, $492. Nystrom's testimony relates the delivery of this truckload to the S. S. *William A. Coulter* at Pier 44, San Francisco. The documents were handled in the same way he has described for other deliveries (R. 2516–2520). On May 8, 1944, upon being advised of the delivery, FBI Agents Magee and Johnson accompanied by both Colonel Hand and Major Evans boarded this ship, found the 40 cases of eggs, all bearing the Nye & Nissen label, in the chill box and observed that of these cases 34 bore the USDA inspection stamp and 6 cases were unstamped. One of the unstamped cases, on being opened, disclosed a candler's card (Ex. 42) bearing the penciled notation "peewee" (R. 3012–3014).

The unstamped cases were weighed by Agent Johnson and Colonel Hand and had an average net weight of 33 pounds 10 ounces, classifying them as peewee (R. 3019). Major Evans candled four cases, all of

which bore the USDA stamp. Two of these graded A small, and of the other two, one graded B small and the other B medium (R. 2688–2691). Thus the fraud is clear.

S. S. "Heber M. Creel"

The evidence in connection with the delivery of Nye & Nissen products to this ship relates only to short weights of cheese, although both eggs and butter were included in the shipment.

The invoice of Nye & Nissen (Ex. 164) is dated May 12, 1944, and addressed to USA, WSA, Olympic Steamship Company, for delivery to the S. S. *Heber M. Creel.*

Nystrom testified that he particularly recalled this delivery because it was made the day before he left the employ of Nye & Nissen.

Two incidents in connection with preparing for the delivery were recalled by Nystrom. In checking his load with the invoice he found that the order called for six cases of American processed cheese but there were only five such cases given to him by Berman. On calling the latter's attention to this fact, Berman replied "We'll substitute a case of Cheddar loaf cheese. That will give the right amount of packages." He further recalled that there was one case of Romano Dolce cheese in the order, invoiced at 65 pounds but the case was clearly stamped in purple ink "Net Weight 56 lb." He drew that to Berman's attention because previously he had seen the weights scraped off the boxes, and he said to Berman, "Do you wish to scrape the weight off this box?" Berman replied,

"No, I'm going to let it go this time. I want to see what happens" (R. 2526–2531, 2606).

On the following day, May 13, 1944, FBI Agent Magee weighed the cheese on shipboard. He found five boxes of American processed cheese instead of the six boxes mentioned in the invoice. In place of the sixth box of American processed cheese, which was priced at 34.9 cents per pound, there was substituted a box of Cheddar loaf cheese at 29.5 cents per pound. Mr. Magee also noted that one case of Romano Dolce cheese which was invoiced at 65 pounds in fact weighed 54 pounds and 3 ounces, and it bore the stenciled stamp on the box showing a weight of 56 pounds.

Thus the testimony of Nystrom was confirmed regarding the short weights, and also the practice of scraping weights off the cheese boxes disclosed in connection with the S. S. *Cape Cumberland* incident is corroborated, giving further proof of a fraudulent course of conduct as alleged in overt act E of the first count of the indictment (R. 2897–2901).

S. S. "James Oliver"

The transactions relating to this ship were received in evidence as an overt act in furtherance of the conspiracy alleged in count 1 and also as a similar transaction to illuminate the criminal intent and the course of conduct which marked the substantive counts.

The invoice covering the delivery of eggs to the S. S. *James Oliver* is exhibit 147. It is dated May 23, 1944, and addressed by Nye & Nissen to USA, WSA, Alaska Transportation Company, General Agent, for products

delivered to the S. S. *James Oliver* at the Moore Dry Dock No. 4, Oakland, California. The invoice described eight cases of medium AA processed eggs and two boxes of butter, in the sum of $153.90.

FBI Agent Magee and Major Evans visited this ship on the same day, namely, May 23, 1944, and the eight cases of eggs were examined. The ship was in dry dock at Oakland, and the supplies covered by the invoice were port stores for consumption during the period that the ship was in dry dock. Agent Magee testified that he examined the invoice at the ship, found the eight cases of eggs in the chill box, and observed that none of the cases bore any inspection stamp and only two bore the Nye & Nissen paper label, the other six having stenciled labels including the words "Nye & Nissen, San Francisco." (R. 2903–2906.)

Major Evans candled the eggs in three of these cases, with the following results:

> Case 1: Contained 70% Grade A, 20% B, 3% C, 3% Light Dirties, 4% Checks. Net weight 38½ pounds. Case graded B Small.
>
> Case 2: This case bore a pencil mark on top of the case, "D-Med." This indicated to witness, as an expert in the egg trade, "Dirties, Medium." Examination of the eggs in this case showed 42% U. S. Light Dirties, 56% U. S. Dirties, 1% Checks. Net weight 38 pounds, 6 ounces. U. S. Light Dirties and U. S. Dirties are given no grade.
>
> Case 3: Inspection showed 56% Grade A, 32% B, 6% C, 2% Blood Spots, 2% Checks,

> 2% Inedibles, consisting of stuck yolks. Net weight 38 pounds, 4 ounces. Case graded B Small.

He further testified that none of these eggs were processed and that the entire lot could not be given any grade owing to the dirty eggs and stuck yolks.

The invoice of Nye & Nissen having charged the Government for eight cases of medium AA processed eggs, the fraud in the transaction is obvious (R. 2716–2722).

ARGUMENT [6]

I. The Court did not err in denying the motion to quash the indictment, in overruling the demurrer and in denying the motion for a bill of particulars

The appellants' brief (pp. 59–69) argues their claim of error in connection with the motion to quash and the demurrer, first, as to count 1, the conspiracy, under their subhead A, second, as to counts 2 to 7, the substantive counts, under subhead B, and the denial of the motion for a bill of particulars under subhead C. In answering their arguments we will utilize the same subheads.

A. As to Count 1

Appellants say in their brief (p. 59):

> The essence of a conspiracy to defraud the United States is an agreement for that purpose. The agreement must be distinctly, directly, and specifically alleged. This the Government entirely failed to do in the first count. All the Government did was to allege generally that the defendants conspired to defraud the United

[6] In our argument we are answering the "Points" of appellants' brief in the same order and under the same numbers.

> States and followed this general allegation by a statement of what was done.

The brief then quotes from *Hamner* v. *United States,* 134 F. (2d) 592, 595, which supports their contention that such an indictment is insufficient.

But the above quotation from their brief is *a complete misstatement* of the indictment. In fact the indictment most definitely, distinctly, and directly alleges what the conspirators agree to do, that is, what comprised the conspiracy. After a comprehensive statement of the purposes of the conspiracy there follow eleven statements of what the conspirators *would do* as a part of the plan (agreement) and conspiracy. Then follow allegations of what *was in fact done* in furtherance of the conspiracy, that is, the overt acts. Thus it is apparent that appellants' counsel either have not read or have misapprehended the language of the indictment.

A situation of almost identical import appears in *United States* v. *Kendzierski,* 54 F. Supp. 164. The defendants in that case moved to quash the indictment for the same reasons urged here. In referring to their argument the Court says at page 166 of the report:

> The next seven pages are devoted to cases sustaining these statements, heaviest reliance being placed on the *Hamner* case (*Hamner* v. *United States,* 5 Cir., 134 F. 2d 592), which was a prosecution under the same statute, where the Court in quashing the indictment stated (134 F. 2d at page 595): "Confused allegations of what the defendants did are by a sort of inference sought to be made allegations of what

> they conspired to do * * *. What was done is often good evidence of what was agreed to be done, but to allege such evidence is not an allowable substitute for a clear statement of the agreement which is proposed to be proven." But the defendants' suggestion that the present case is controlled thereby evidences that they have misread the indictment by which they are accused. Far from being analogous to the Hamner indictment, it would appear that the instant indictment may well have been drawn with an eye to avoiding the very defect there revealed. The second and third paragraphs of this indictment (as set forth in the accompanying footnote) do not relate to acts done in pursuance of the agreement but are clearly allegations of what comprised the conspiracy itself, viz.—what the participants agreed to do, namely, that they "would unlawfully buy, obtain," etc., and that they "would give, sell, and distribute" etc. What the defendants actually did thereafter to effect the object of this conspiracy is set forth in the latter part of the indictment as Overt Acts. The indictment sufficiently sets forth the crime charged and is not defective on the first ground asserted.

The complete analogy between that decision and the instant case is apparent from the reading of the portions of the indictment as they appear in the footnote on page 166 of the report, and no further argument is necessary to refute this claim of appellants herein.

It is next asserted in appellants' brief (pp. 61, 62) that the allegation in the indictment "that the defendants allegedly conspired to impede, impair, obstruct,

and defeat the lawful functions of a department of the United States of America is a mere conclusion of law" and is therefore inadequate.

This allegation of the indictment is one of the component parts or purposes of the conspiracy and reads as follows (R. 5):

> B. By impeding, impairing, obstructing, and defeating the lawful functions of the United States Department of Agriculture, War Department, and Navy Department in the inspection, grading, weighing, and purchase of butter, cheese, and eggs.

In criticizing this allegation the appellants consider only a portion of it, take it away from its context and consider it apart from the indictment as a whole, thus violating a basic principle of construction. See *United States* v. *Ozark Canners Ass'n,* 51 F. Supp. 150, 152, where the Court says:

> The court must examine the indictment as a whole. The relationship between all the various paragraphs must be borne in mind. "The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." *United States* v. *Patten*, 226 U. S. 525, 544, 33 S. Ct. 141, 145, 57 L. Ed. 333, 44 L. R. A., N. S. 325.

But, even as read, without reference to other parts of the indictment, it leaves no doubt in the minds of the accused of the offense charged and what they must meet in defense. So long as they are so advised and are protected against another prosecution for the same

offense, the indictment is sufficient. *United States* v. *Cruikshank,* 92 U. S. 542, 558.

It is further asserted in appellants' brief (p. 62) that the indictment is defective because in charging a continuing conspiracy from the year 1938 it is related to acts involving the WSA, which did not come into existence until 1942. This claim is completely answered by this Court in *Rose* v. *United States,* 149 F. (2d) 755 (C. C. A. 9), in the 1st syllabus and the corresponding text on pages 757 and 758, reading as follows:

> Appellants complain that the district court erred in overruling their demurrers to the indictment because, they insist, the indictment fails adequately to state an offense against the laws of the United States. They claim the indictment defective in charging a conspiracy commencing December 12, 1941, to violate the Second War Powers Act, which was not adopted until March 27, 1942. The claim is unfounded as the conspiracy was unlawful under previous statutes named in the indictment and continued to be unlawful under the subsequently enacted statutes.

Again, on page 62 of their brief, appellants seem to imply that the indictment is duplicitous in that it charges several unrelated conspiracies in a single count. However, the charge here is of a single conspiracy with its objects extending over a period of years and including numerous offenses. The evidence clearly established that theory of the case, and it is necessary to refer only to *Braverman* v. *United States,*

317 U. S. 48, to show the propriety of that theory as expressed in the allegations of the indictment.

B. As to Counts 2 to 7, the Substantive Counts

On pages 62 to 64 of their brief the appellants argue that the substantive counts are invalid because "it does not appear from the indictment that the fraudulent and fictitious statements alleged to have been made were in fact in a matter within the jurisdiction of any department or agency of the United States."

Again it appears that counsel for appellants have either not read or have misapprehended the character of the allegations of the indictment in these counts. There is no charge in the indictment that the defendants made false claims against the several shipping companies mentioned in these counts, but in each of said counts it is definitely stated that the invoice from Nye & Nissen was addressed to the United States of America, War Shipping Administration, and then naming the general agent as acting for WSA. As a matter of inducement and preliminary allegation it is alleged that the particular shipping company had a general agency contract with WSA to manage and conduct the business of vessels assigned to it "by the United States, for the United States, and under the directions, orders, and regulations of the United States."

As a typical example, we refer to the allegations in the third count of the indictment, which relates to supplies furnished to the S. S. *Mission San Diego,* which was under the control of WSA and assigned

for the management of its operations to Deconhil Shipping Company. Not only do the allegations of the indictment charge that the false invoice of Nye & Nissen was directed to the United States of America, War Shipping Administration, but the proof shows, as set forth in the statement in this brief relating to the S. S. *Mission San Diego* (Br. pp. 58, 59) and as hereafter explained, that the payment of this invoice was made out of Government funds supplied to the general agent in the form of a revolving fund in which a balance of such funds was always maintained. As an example of the manner in which the business of WSA was performed, we have directed attention to the testimony of Hugh Gallagher in a footnote to the factual statement at page 3 of this brief. In connection with the third count, which we are using as an example, we refer to the testimony of Leslie R. Kerdell, the secretary and treasurer of Deconhil Shipping Company, appearing on pages 2278 to 2283 of the record, wherein again is explained the character of the agency relationship between the shipping company and WSA and the manner of payment. We also refer to exhibit 4 herein, which is a certified copy of the contract between WSA and Deconhill Shipping Company. It is nowhere claimed either in the indictment or in the brief that these shipping companies were departments or agencies of the United States, the uniform claim made in the several counts, as above noted, being that the false and fraudulent invoices were submitted to WSA and paid by WSA.

The case of *Lowe* v. *United States,* 141 F. (2d) 1005, which is cited by appellants is not at all in point. In that case the alleged false claim was submitted to a private corporation of which the defendant was an employee, the latter being then engaged in building ships under a contract with the Maritime Commission, an agency of the United States. The remote connection between the defendant in that case and the Government agency is in nowise analogous to the situation which obtains in the instant case.

From the foregoing it clearly appears that there is no infirmity in the indictment in the respect charged by appellants.

C. The Denial of Motion for Bill of Particulars

The defendants' motion for a bill of particulars extends from page 41 to page 56 of the record and comprises 106 specifications wherein they ask further particulars. In effect the motion asks for the Government's evidence in its entirety and amounts to a bill of discovery.

The indictment, taken as a whole, is an exceedingly specific document, and it advises the defendants of every element of the Government's case. In appellants' brief, at page 65, they say, "In urging that the Court erred in denying the said Bill we are not unmindful of the rule of practice which declares that ordinarily a motion for a Bill of Particulars is addressed to the sound discretion of the trial Court and that this discretion should not be the subject of review except where manifest prejudice has resulted."

Their having conceded that much, it seems necessary only to direct the Court's attention to two Ninth Circuit decisions as follows:

In *Rubio* v. *United States* (C. C. A. 9, 1927), 22 F. (2d) 766, cert. den. 276 U. S. 619, the Court said in part (pp. 767–768):

> 2. Speaking generally, the government has no knowledge of the exact time or place of the formation of the conspiracy, and to require it to specify the particular time and place, and limit the proof to that time and place would defeat almost every prosecution under this act. For these reasons, we are satisfied that the time and place of the formation of the conspiracy are sufficiently fixed by the overt acts set forth in the indictment. *Fisher* v. *United States* (C. C. A.), 2 F. (2d) 843; *Woitte* v. *United States* (C. C. A.), 19 F. (2d) 506.
>
> 3. To require the government to set forth every act tending to connect each of the parties charged with the conspiracy, and every act committed by each of the parties in furtherance of the object of the conspiracy, would be to require it to make a complete discovery of its entire case. Such is not the office or function of a bill of particulars. In almost every prosecution facts and circumstances are given in evidence of which the charge in the indictment gives no notice. If the defendant is taken by surprise, the court has ample power to protect him by granting a continuance upon a proper showing, or by granting a new trial if his rights cannot otherwise be safeguarded; but, if not taken by surprise, he has no just ground for complaint.

Robinson v. *United States* (C. C. A. 9, 1929), 33 F. (2d) 238, 240, is to the same effect.

United States v. *General Petroleum Co.,* 33 F. Supp. 95 (D. C. So. Calif.), at page 99, cites with approval the *Rubio* case on its point 3 set forth above.

In *Mulloney* v. *United States* (C. C. A. 1, 1935), 79 F. (2d) 566, cert. den. 296 U. S. 658, the Court said, at page 572:

> The purpose of a bill of particulars is the better to apprise the defendant of the crime charged to enable him properly to prepare his defense. It is not to furnish him in advance with the government's evidence and, if the indictment properly sets forth a crime, a motion of this character which would unduly limit the evidence of the government should not be granted. *Rubio* v. *United States* (C. C. A.), 22 F. (2d) 766; *Robinson* v. *United States* (C. C. A.), 33 F. (2d) 238; *United States* v. *Brown* (D. C.), 56 F. (2d) 659.

We further direct the Court's attention to the fact that appellants' brief makes only a bare statement that prejudice resulted from the failure of the trial court to grant the motion for a bill of particulars, but they have established no surprise or prejudice, and certainly the Government was not required to make available to the defendants all of its evidence.

In *Stumbo* v. *United States* (C. C. A. 6, 1937), 90 F. (2d) 828, cert. denied 302 U. S. 755, the court at page 832 said:

> Likewise within the discretion of the court was the motion for a more specific bill of par-

ticulars. *Wong Tai.* v. *United States,* 273 U. S. 77, 47 S. Ct. 300, 71 L. Ed. 545. The original bill went into considerable detail. The motion for amplification requested information concerning the minutest items of evidence. We know of no invasion of the rights of defendants in the failure of the court to require that the government lay before them its entire case.

In *Sawyer* v. *United States* (C. C. A. 8, 1937), 89 F. (2d) 139 at 141, the court said:

> If the language of the indictment is so far definite and certain as to safeguard all of the rights of a defendant and to enable him properly to prepare his defense, a bill of particulars will not be required. *Bedell* v. *United States* (C. C. A.), 78 F. (2d) 358. The granting or the refusal of a motion for a bill of particulars is a matter that is governed by the sound judicial discretion of the trial court, and unless it shall be shown affirmatively that such discretion has been abused by the trial court a refusal to require a bill of particulars will not be disturbed by an appellate court. *Peck* v. *United States* (C. C. A.), 65 F. (2d) 59; *Bedell* v. *United States* (C. C. A.), 78 F. (2d) 358, 362; *Rubio* v. *United States* (C. C. A.), 22 F. (2d) 766; *Olmstead* v. *United States* (C. C. A.), 19 F. (2d) 842, 844, 53 A. L. R. 1472.

The granting of the bill of particulars rested in the sound discretion of the Court, and that discretion was not abused. There is no merit to this contention of appellants.

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II. The Evidence was Overwhelming to Sustain the Verdict on Every Count of the Indictment and the Trial Court Properly Denied the Motions for Directed Verdicts of Acquittal

Appellants present their arguments on Point II under four subheads and we answer these arguments in the same manner.

A. The Proof as to Moncharsh Was Insufficient in Support of His Guilt Under the Conspiracy Count

In our statement we have amply demonstrated his guilt and his initial and continuing responsibility for the fraud and deceit which marked the operations of his company during the entire period of the conspiracy. But, at some cost of repetition, we will briefly enumerate the items of evidence showing his control of and participation in the scheme:

(1) He was admittedly president of the corporation and the owner of a large proportion of its stock.

(2) He had charge of the Nye & Nissen plants. If anything went wrong, or if anything had to be done, he was the man to give the final orders. If Goddard was not around, and the employees were doing something wrong, he would correct them. He had general supervision of all the operations of the plant (Pineda—R. 446).

(3) He came down to the floor of the warehouse every day, about ten or eleven (Pineda—R. 471).

(4) Trina Robles, Nye & Nissen bookkeeper, identified Moncharsh as being in charge of the business of the company in the San Francisco office (R. 3158).

(5) Major Evans stated that he had conversations with Moncharsh at various times up until December 1943 if he had certain difficulties in regard to inspections (R. 2640–2642).

(6) Occasionally he would supervise the unloading of eggs on the floor of the main warehouse; also he would pass on to Goddard the orders received by the company for deliveries of eggs (Pineda—R. 460).

(7) Andrade identified rubber stamp similar to that of USDA in possession of Moncharsh (R. 3223).

(8) Andrade stated that Moncharsh gave him orders to buff inspection stamps off cases of eggs that Moosman had inspected (R. 3240).

(9) Andrade had conversation with Moncharsh about the eggs rejected by Colonel Kielsmeier, and Moncharsh told Andrade how to handle the situation so as to deceive that inspector (R. 3248–3251).

(10) Andrade saw Moncharsh using rubber stamp to stamp up cases of eggs after Moosman had left plant, and Moncharsh almost got caught by Moosman when he returned unexpectedly (R. 3258, 3259).

(11) Andrade states that he stamped up cases of eggs with rubber stamp under instructions of Moncharsh (R. 3293).

(12) On one occasion early in 1944, Moncharsh called Mericle to inspect eggs at the Nye & Nissen plant. In doing so, Moncharsh advised him of the grade and size of the order to be inspected (R. 243).

(13) Also, he sometimes called Hand to the Nye & Nissen plant to inspect some eggs or butter (R. 367, 394).

(14) When Moncharsh called him to inspect eggs, Hand would follow the procedure which he outlined in making that inspection (R. 394, 395).

(15) About June 1941, Moncharsh told Goddard and Menges to have the candlers prepare a number

of samples for an Army order, and to place cut-outs in cases similar to those called for by that order (Pineda—R. 1067–1070). It took about a week to put this order up. During this period, Moncharsh came in every day and watched what went on (R. 471).

(16) In February 1941 some cold storage eggs were brought into the Nye & Nissen plant. Moncharsh told Pineda and Nix to keep the cases far apart so that they would dry out fast. He said to do a good job as Colonel Hand would be coming out to inspect the eggs (R. 1152, 1153). About this same day he told Ruby Goddard to be sure to have enough cold storage eggs on hand at all times (R. 806). When Colonel Hand came down to inspect a little later, he was shown sample cases containing fresh eggs, which he passed. The lot which was actually delivered to the Army on this occasion, however, was mostly the cold storage eggs. The same sample cases of fresh eggs were inspected by the Colonel five or six times. On each of these times a similar switch was made, and the Army never got fresh eggs (R. 807–812).

(17) About November 1941, Moncharsh was present with the other defendants, Nix and Pineda, outside the candling room of the company's plant. At this time Goddard told them all to come back and transfer eggs after supper. They and some girl candlers did so (R. 891–893, 1237). They then transferred about 200 cases of inspected eggs (Veterinary Corps stamp) and replaced them with cut-outs from cases bearing a red label (R. 1233–1235). Early that evening Moncharsh and Berman helped transfer two

cases of eggs, but they were so awkward that they later helped cover and nail the cases instead (R. 894).

(18) Moncharsh was also present another evening when eggs were switched in a similar manner. On this occasion they had to break wire strapping, which indicated that the eggs were for Army export shipment (R. 897).

(19) About January 1940, Moncharsh was present when Goddard told Pineda that he would have to work that Saturday because the company had been caught red-handed on some eggs that had been delivered and inspected by the Army (R. 899).

(20) Moncharsh told Gartenberg to inspect the eggs and butter on board the S. S. *Clark* (November 1, 1943). Gartenberg did so and submitted a report to him showing how bad the eggs and butter were (R. 2101, 2102).

(21) Moncharsh told FBI Agents Magee and Johnson that he was familiar with the type and quality and grades of all eggs sold and delivered out of Nye & Nissen's plant in San Francisco; that he personally dictated all the policies of Nye & Nissen and regulated and decided the daily prices of their products (R. 4339–4340; 4346–4347).

B. The Evidence of the Case Was Sufficient to Support the Verdict Convicting Moncharsh Under the Substantive Counts

The long argument in appellants' brief to the contrary of the above proposition, extending from page 76 to page 88, can be answered in a short space. We have demonstrated Moncharsh's guilt under the con-

spiracy count both in our statement of the evidence and in the preceding argument under subhead A of this Point II. It has further unquestionably been shown that the offenses described in the substantive counts were all in furtherance of the conspiracy, that is to say, they were all overt acts committed in effecting its objects.

At several points in the trial, counsel for the appellants urged their motions for a directed verdict of acquittal, for a new trial, and in arrest of judgment on the same grounds as again argued here. In those motions they relied heavily on the case of *United States* v. *Sall,* 116 F. (2d) 745, where it was held that participation in the conspiracy was not itself enough to sustain a conviction for the substantive offense even though it was committed in furtherance of the conspiracy. The trial court overruled all of those motions and rightly, because within two months after the close of the trial the Supreme Court decided the case of *Pinkerton* v. *United States,* 328 U. S. 640, specifically overruling the *Sall* case and saying (pp. 646–647):

> Daniel relies on *United States* v. *Sall, supra.* That case held that participation in the conspiracy was not itself enough to sustain a conviction for the substantive offense even though it was committed in furtherance of the conspiracy. The court held that, in addition to evidence that the offense was in fact committed in furtherance of the conspiracy, evidence of direct participation in the commission of the substantive offense or other evidence from which participation might fairly be inferred was necessary.

We take a different view. We have here a continuous conspiracy. There is here no evidence of the affirmative action on the part of Daniel which is necessary to establish his withdrawal from it. *Hyde* v. *United States,* 225 U. S. 347, 369. As stated in that case, "Having joined in an unlawful scheme, having constituted agents for its performance, scheme and agency to be continuous until full fruition be secured, until he does some act to disavow or defeat the purpose he is in no situation to claim the delay of the law. As the offense has not been terminated or accomplished he is still offending. And we think, consciously offending, offending as certainly, as we have said, as at the first moment of his confederation, and consciously through every moment of its existence." *Id.,* p. 369. And so long as the partnership in crime continues, the partners act for each other in carrying it forward. It is settled that "an overt act of one partner may be the act of all without any new agreement specifically directed to that act." *United States* v. *Kissel,* 218 U. S. 601, 608. Motive or intent may be proved by the acts or declarations of some of the conspirators in furtherance of the common objective. *Wiborg* v. *United States,* 163 U. S. 657–658. A scheme to use the mails to defraud, which is joined in by more than one person, is a conspiracy. *Cochran* v. *United States,* 41 F. 2d 193, 199–200. Yet all members are responsible, though only one did the mailing. *Cochran* v. *United States, supra; Mackett* v. *United States,* 90 F. 2d 462, 464; *Baker* v. *United States,* 115 F. 2d 533, 540; *Blue* v. *United States,* 138 F. 2d 351, 359. The govern-

> ing principle is the same when the substantive offense is committed by one of the conspirators in furtherance of the unlawful project. *Johnson* v. *United States*, 62 F. 2d 32, 34. The criminal intent to do the act is established by the formation of the conspiracy. Each conspirator instigated the commission of the crime. The unlawful agreement contemplated precisely what was done. It was formed for the purpose. The act done was in execution of the enterprise. The rule which holds responsible one who counsels, procures, or commands another to commit a crime is founded on the same principle. That principle is recognized in the law of conspiracy when the overt act of one partner in crime is attributable to all. An overt act is an essential ingredient of the crime of conspiracy under § 37 of the Criminal Code, 18 U. S. C. § 88. If that can be supplied by the act of one conspirator, we fail to see why the same or other acts in furtherance of the conspiracy are likewise not attributable to the others for the purpose of holding them responsible for the substantive offense.

This completely establishes the fallacy of appellants' argument.

C. The Court Did Not Err in Refusing to Direct a Verdict of Acquittal as to the Defendant Moncharsh

Appellants in asserting that the court erred in refusing to direct a verdict of acquittal as to Moncharsh, represent that the law is well settled that unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial judge to direct a verdict for the accused and cite some twenty-three cases in support thereof.

Appellants further assert that as to the appellate function the rule is that where all the substantial evidence is as consistent with innocence as guilt it is the duty of the appellate court to reverse judgment against the defendant, citing, among other cases, *Hammond* v. *United States*, 127 F. (2d) 752, (App. D. C. 1942).

The standard which appellants assert should have been adopted by the court below in passing on the motion for a directed verdict of acquittal is neither supported by the weight of authority nor is it in harmony with the most recent decisions of the Supreme Court upon the question. In *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, one of the defendants sought reversal of his conviction on the ground that there was no substantial evidence that he had knowledge of or participated in the unlawful conspiracy. He had raised the question by a motion for a directed verdict at the close of the case, and in the Supreme Court relied upon the doctrine of *Isbell* v. *United States,* 227 Fed. 788 (C. C. A. 8), upon which appellants here also rely. The Supreme Court said (310 U. S. at 254):

> * * * His motion for a directed verdict at the conclusion of the case was denied by the trial court and the Circuit Court of Appeals held that there was no error in such denial. A question of law is thus raised, which entails an examination of the record, not for the purpose of weighing the evidence but only to ascertain whether there was some competent and substantial evidence before the jury fairly

> tending to sustain the verdict. *Abrams* v. *United States,* 250 U. S. 616, 619; *Troxell* v. *Delaware, L. & W. R. Co.,* 227 U. S. 434, 444; *Lancaster* v. *Collins.* 115 U. S. 222, 225.

See also *Glasser* v. *United States,* 315 U. S. 60, 80; *Gorin* v. *United States,* 312 U. S. 19, 32; *Pierce* v. *United States,* 252 U. S. 239, 251–252; *Stilson* v. *United States,* 250 U. S. 583, 588–589. Obviously, if substantial evidence is the proper test by which to judge the action of the trial judge in permitting a case to go to the jury, it is the proper test for the trial judge to apply on a motion for a directed verdict.

Almost every circuit court of appeals in the country has held that in situations where a finding of guilt depends on the inferences to be drawn from the circumstances proved, the determination whether such circumstances are sufficient to establish guilt beyond a reasonable doubt is for the jury and not for the court. *Morton* v. *United States,* 147 F. (2d) 28, 30 (App. D. C.), certiorari denied, 324 U. S. 875; *Yoffe* v. *United States,* 153 F. (2d) 570, 573 (C. C. A. 1); *United States* v. *Valenti,* 134 F. (2d) 362, 364 (C. C. A. 2), certiorari denied, 319 U. S. 761; *United States* v. *Picarelli,* 148 F. (2d) 997, 998 (C. C. A. 2); *United States* v. *Brandenburg,* 155 F. (2d) 110, 112 (C. C. A. 3); *United States* v. *Reginelli* 133 F. (2d) 595, 599 (C. C. A. 3), certiorari denied, 318 U. S. 783; *Roberts* v. *United States,* 151 F. (2d) 664, 665 (C. C. A. 5); *Whaley* v. *United States,* 141 F. (2d) 1010 (C. C. A. 5), certiorari denied, 323 U. S. 742; *Blalack* v. *United States,* 154 F. (2d) 591, 594

(C. C. A. 6), certiorari denied, 329 U. S. 738; *United States* v. *Levy,* 138 F. (2d) 429, 430–431 (C. C. A. 7), certiorari denied, 321 U. S. 770; *Braatelien* v. *United States,* 147 F. (2d) 888, 893 (C. C. A. 8); *Hansbrough* v. *United States,* 156 F. (2d) 327, 329 (C. C. A. 8); *Gorin* v. *United States,* 111 F. (2d) 712, 721 (C. C. A. 9), affirmed, 312 U. S. 19; *Scott* v. *United States,* 145 F. (2d) 405, 408 (C. C. A. 10); certiorari denied, 323 U. S. 801; *Rogers* v. *United States,* 129 F. (2d) 843, 844 (C. C. A. 10). When examined in relation to their facts, it is clear that the decisions relied upon by appellants hold no more than that a verdict of acquittal must be directed if the evidence, taken in the light most favorable to the Government and with all possible inferences drawn in favor of the Government, is still as consistent with innocence as with guilt. Those decisions do not hold that, where the inferences that reasonably can be drawn from the Government's evidence may establish guilt beyond a reasonable doubt, a verdict of acquittal must be directed merely because, by indulging in every possible inference in favor of a defendant, it is possible to devise an innocent explanation of defendant's conduct. If that were the rule, no case in which any inference must be drawn by the jury could stand. See *United States* v. *Valenti,* 134 F. (2d) 362, certiorari denied, 319 U. S. 761, *supra.*

If any conflict in fact exists between the decisions of the various circuits, all doubt respecting the proper standards to be applied by the trial court in passing upon a motion for a directed verdict of acquittal was

resolved when the Supreme Court denied certiorari in the case of *Curley* v. *United States,* 331 U. S. 837, rehearing denied 331 U. S. 869. In that case, which arose in the District of Columbia in 1946, the principal point made by the appellant Curley was that the trial court erred in refusing to direct a verdict of acquittal as to him. It was not disputed that upon a motion for a directed verdict the judge must assume the truth of the Government's evidence and give the Government the benefit of all legitimate inferences to be drawn therefrom. The Court of Appeals for the District of Columbia, Mr. Justice Wilbur K. Miller, dissenting, 160 F. (2d) 229, there held:

> Appellant relies upon statements of this and other courts concerning the tests by which a trial judge must determine the proper action upon the motion. For example, in *Hammond* v. *United States,* 75 U. S. App. D. C. 397, 127 F. (2d) 752 (1942), this court quoted from Isbell v. United States as follows:
>
> "Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt it is the duty of the trial judge to instruct the jury to return a verdict for the accused, and where all the substantial evidence is as consistent with innocence as with guilt it is the duty of the appellate court to reverse a judgment against him."
>
> It is true that the quoted statement seems to say that unless the evidence excludes the hypothesis of innocence, the judge must direct a verdict. And it also seems to say that if the evidence is such that a reasonable mind might fairly conclude either innocence or guilt, a

verdict of guilt must be reversed on appeal. But obviously neither of those translations is the law. Logically, the ultimate premise of that thesis is that if a reasonable mind might have a reasonable doubt, there is, therefore, a reasonable doubt. That is not true. Like many another rule become trite by repetition, the quoted statement is misleading and has become confused in application.

The functions of the jury include the determination of the credibility of witnesses, the weighing of the evidence, and the drawing of justifiable inferences of fact from proven facts. It is the function of the judge to deny the jury any opportunity to operate beyond its province. The jury may not be permitted to conjecture merely, or to conclude upon pure speculation or from passion, prejudice or sympathy. The critical point in this boundary is the existence or non-existence of a reasonable doubt as to guilt. If the evidence is such that reasonable jurymen must necessarily have such a doubt, the judge must require acquittal, because no other result is permissible within the fixed bounds of jury consideration. But if a reasonable mind might fairly have a reasonable doubt or might fairly not have one, the case is for the jury, and the decision is for the jurors to make. The law recognizes that the scope of a reasonable mind is broad. Its conclusion is not always a point certain, but, upon given evidence, may be one of a number of conclusions. Both innocence and guilt beyond reasonable doubt may lie fairly within the limits of reasonable conclusion from given facts. The judge's function is exhausted when he de-

termines that the evidence does or does not permit the conclusion of guilt beyond reasonable doubt within the fair operation of a reasonable mind.

The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter.

That there was an abundance of substantial proof that Moncharsh engaged in a conspiracy to defraud the United States and that the trial court did not err in refusing to direct a verdict of acquittal as to him and his corporation there can be no doubt. The nature and details of such proof are set forth elsewhere herein (pp. 94–97).

D. The Scope of the Conspiracy and Its Continuity Are Clearly Established by the Evidence

Appellants' brief on pages 91 and 92 briefly argues that a continuing conspiracy was not so established. With equal brevity we answer that argument.

It is apparent from the evidence as we have summarized it in our statement that the conspiracy was

in effect previous to the date named in the indictment, namely, January 1, 1938, and it is equally certain that the pattern of fraud instituted by the defendants continued without cessation at least to December of 1944, when the S. S. *Hawaiian Shipper* was supplied with inferior and inedible eggs. The deceit practiced upon Army inspectors was an obvious matter of routine even before Pearl Harbor, as testified by both Pineda and Andrade, and also by Colonel Hand, and after that event, when WSA came into the picture as the governmental agency supplying its ships with food products, the same practice continued, and doubtless more boldly, as greater opportunities for this character of fraud appeared.

It is worthy of notice that the former Nye & Nissen employees who testified for the Government covered, in their employment, an overlapping of continuous employment during the whole period of the conspiracy up to and beyond the date of the S. S. *Hawaiian Shipper* episode, as follows:

Andrade, from the beginning to November 1940 (R. 3219).

Pineda, from the beginning to March 1943 (R. 444).

Valdez, from 1941 to 1943 (R. 4289).

McKenna, from the beginning to 1945 (R. 4300).

Matheson, from the beginning to 1943 (R. 4309).

Higuera, from the beginning to 1942 (R. 4315).

Briant, from September to December 1940 (R. 3177).

Nystrom, from January to May 1944 (R. 2450).

III. There Is No Error in the Record Relating to the Condition of Eggs Aboard Ship as Proof of Their Condition at the Time of Delivery

In their brief, pages 93 to 101, the appellants argue that the Court erred in permitting the jury to infer that the condition of eggs aboard ship was proof of the condition at the time of delivery. They particularly direct attention to the S. S. *William S. Clark* incident, the S. S. *Hawaiian Shipper* incident, the S. S. *John Muir* incident, and the testimony of Colonel Hand relating to the condition of eggs at the Presidio and at Letterman Hospital. Their claims involve such a straining of the evidence as to be entirely untenable.

In great detail, we have discussed in our statement the circumstances relating to the condition of the eggs on the S. S. *William S. Clark* (Br. 38) and the S. S. *Hawaiian Shipper* (Br. 47).

On the S. S. *William S. Clark* it was shown that the eggs, although sold and invoiced as medium AA processed eggs, were in fact old eggs that had been in storage for eight months and were not processed. The witness Brown, the ship's cook, found these eggs to be rotten and inedible in large part, which is a perfectly natural consequence of their having been kept in storage for many months without the protection of processing with oil. Again, in the incident relating to the S. S. *Hawaiian Shipper,* these eggs were invoiced as large processed procurement No. 1 eggs, which is equivalent to grade AA. Within a matter of a week or two after the ship left port they were found to be not only inedible in large part but in many cases of eggs there were whole layers missing. It should be remembered that the

eggs thus delivered to WSA ships were known by the defendants to be for use during a voyage of several months in extent, and it was further known by them that normally there would be no opportunity for complaint until this long period of time had elapsed, thus giving ample opportunity for such tenuous reasons or excuses for bad condition as their ingenuity might suggest.

It should further be remembered that in almost every one of the ships visited by the FBI agents and the Army inspectors, not only eggs inferior in quality were discovered but eggs so small as to be classified as peewees were found in large quantities but always invoiced as medium or large eggs.

Again the testimony of Colonel Hand is referred to in connection with his discovery of rotten eggs at the Presidio and at Letterman Hospital, the cases containing them bearing his own inspection stamp of two or three days previously. He testified that these eggs had been kept under ample refrigeration since their delivery at these Army posts, and the fact that they were found to be inferior upon his examination there confirms the testimony of Pineda of the deceit practiced upon the Army inspectors, including Colonel Hand, by transferring eggs from inspected and stamped cases and substituting inferior eggs after the inspector had left the plant.

So far as the S. S. *John Muir* is concerned, the details of the inspection of eggs on this ship appear at page 74 of our statement. It there appears that of the 48 cases of eggs delivered to this ship, 10 cases did not bear the USDA inspection stamp, all these bore the stamped purple "P" indicating pullet or

peewee eggs, and 3 of these were weighed and proved to be peewees, weighing on an average five pounds per case under the established weight of small eggs, and all were invoiced to the United States as medium processed AA eggs. Further, it was found on candling that they contained rots, checks, and dirties to the extent that they could be given no grade whatever.

It should further be noted that as to every ship where eggs were examined, the chill box or refrigerator where eggs were kept was in proper condition for the preservation of eggs. The statement made in appellants' brief that the chill box on the S. S. *William S. Clark* was defective is not sustained by the evidence, but, on the contrary, it definitely appears that on an occasion when the red light at the chill box appeared, to indicate a lowering of temperature, the condition was immediately corrected.

All the contentions made by appellants are based upon hypotheses that are untrue and are not sustained by the record.

Appellants complain that the Court improperly refused their instruction No. 116, appearing at page 103 of their brief. Consideration of this request in the light of the record is so misleading that to have given it would have been only to confuse the jury as to the issues of the case.

IV. The Record Contains No Instance of Prejudicial Misconduct on the Part of Government Counsel

Appellants complain that the Government prosecutor was guilty of misconduct prejudicial to the appellant Moncharsh in cross-examining him relative to

whether he had offered presents to Colonel Hand, the Army inspector. While the prosecutor did ask such questions of the witness Moncharsh (R. 4142, 4143), no objection was interposed to that line of questioning at the trial, and it is to be noted that the witness denied ever having proffered gifts to Colonel Hand. Furthermore, the defense did not at any time during the trial of the case request the Court to direct the jury to disregard this cross-examination or assign it as misconduct. In view of the fact that appellant's answers were uncontroverted by the Government, though they were favorable to the appellant, it is difficult to understand how this brief line of questioning could have in any way prejudiced the minds of the jurors. In all probability it had the contrary effect.

Appellants also vigorously contend that there was prejudicial misconduct on the part of the prosecutor when, in the course of cross-examining the witness relative to his relationship with the United States Navy, he asked the appellant Moncharsh whether he was debarred for a period of 10 years. While appellants' counsel first objected to the question and assigned it as misconduct, he later requested that any reference to the debarment by the Navy be stricken from the record and that the jury be instructed to disregard it. The Court thereupon stated, "Let it go out and the jury will disregard it" (R. 4173). On these facts there is no basis for reversal of the judgment below, since the appellant did not ask that a mistrial be declared and was sustained in his request.

that the jury be instructed to disregard the offending question. The instruction having been given by the Court, nothing more was required. See *Utley* v. *United States,* 115 F. (2d) 117, 119 (C. C. A. 9).

Appellants also urge that the prosecutor was guilty of misconduct in extracting three very small eggs from a small carton which bore the words "Large Grade A Eggs." We have given an extended account of this episode in our statement, *supra* (pp. 62–63), noting that the circumstance concerning the extraction of small eggs from a box bearing the label "Large Grade A Eggs" was first directed to the jury's attention by the action of the defendants' counsel, Mr. Faulkner, when he charged that Government counsel had deliberately picked a Nye & Nissen carton marked "Large Eggs" in bringing the small eggs into the courtroom so as to make some sort of impression on the jury. Government counsel stated that the Government was not bringing in the container for any purpose. The Court dealt with this situation by directing the jury to disregard the remarks of counsel on both sides, stating that the eggs were received in evidence and that the carton was to be dispensed with. The eggs were then placed in another container and exhibited to the jury (R. 3024–3028).

In view of the fact that the jury was immediately instructed to disregard the remarks of counsel, and the offending carton was immediately removed from the courtroom, there could have been no prejudice to the appellant, since it is presumed that the jury followed the Court's instructions. *Parmagini* v. *United States,* 42 F. (2d) 721, 724 (C. C. A. 9).

Finally, the entire alleged misconduct on the part of the prosecutor consists of but three isolated instances of short duration in a bitterly contested trial which continued for a period of almost three months. Such misconduct, if such it be, could not have affected the conclusion of the jury in this case, for the evidence overwhelmingly established the guilt of the appellants. See *Landay* v. *United States,* 108 F. (2d) 698, 706 (C. C. A. 6).

V. The Trial Court Properly Admitted in Evidence the So-called "S. S. Bates Letters" and the "Gartenberg Letter"

Appellants complain because Government exhibits Nos. 179, 180, 181, 182, and 183 were received in evidence. The objection is that the exhibits related to collateral matters and were not competent for the purpose of impeachment. Without undertaking to analyze the cases cited by appellants, we may say that they have no application here, for neither the exhibits nor the cross-examination concerning them related to collateral matters. The examination by Government counsel was in direct cross of testimony elicited on direct examination, and related to an issue thus raised by the defense. The exhibits themselves, for which a complete foundation was laid, were so far inconsistent with the testimony of appellant Moncharsh as to reflect upon his credibility as a witness, and were thus competent for the purpose of impeachment. A brief examination of the record will demonstrate the correctness of this contention.

The appellant Moncharsh was asked on direct if he had received or if there had come to his atten-

tion any complaints from steamship companies with respect to Nye & Nissen deliveries. Defense counsel indeed undertook to limit the testimony on direct to the specific period from April 24, 1944, to May 13th of the same year, perhaps on the hypothesis that the cross-examination would be thus limited to the same period. But the witness said he did not "ever remember a complaint from a steamship company with the exception of the William S. Clark," and, notwithstanding the efforts of defense counsel to explain and interpret the meaning of the answer, the witness admitted on cross-examination that the answer encompassed *any* complaint relating to the delivery of eggs or other produce to ships of the WSA.

This line of testimony on direct examination was obviously intended to demonstrate the good faith of appellant Moncharsh, and to show his lack of knowledge of the practices charged in the indictment. If believed it would, at least, have that effect, and it is therefore doubtful if the cross-examination could properly have been restricted to the narrow limits within which defense counsel sought to confine it even had the witness limited his answer to that period (April 24 to May 13). We do not deem it necessary, however, to argue this phase of the matter, for reference to the exhibits themselves will show that the final letter of this series was dated on April 24, 1944, and thus brought the whole transaction within the narrow limits so meticulously fixed by defense counsel.

For all of these reasons the incident was a proper

subject for full and complete cross-examination and the documents were competent for the purpose of impeachment. The following excerpt from a recent decision of this Court in *Cossack* v. *United States,* 63 F. (2d) 511, 516, is, we submit, the law of this case on the point at issue:

> It is elementary, of course, that on cross-examination a witness may be asked whether he did not make certain statements inconsistent with his present testimony. *Heard* v. *United States* (C .C. A. 8) 255 F. 829, 832, and *United States* v. *Phelan* (D. C.) 252 F. 891, 892.
>
> As was said in the *Heard* case, supra: "*A full cross-examination of a witness upon the subjects of his examination in chief is the absolute right, not the mere privilege, of the party against whom he is called, and a denial of this right is a prejudicial and fatal error. It is only after the right has been substantially and fairly exercised that the allowance of cross-examination becomes discretionary* [*Many cases cited*]." [Italics supplied.]

As to the Gartenberg letter, the objection is equally without merit. Admissibility of the letter did not depend upon proof of mailing and the other conditions discussed in appellants' brief, for there was other and direct evidence that the witness (Moncharsh) had received it. Gartenberg testified that on the day after the letter was written, Moncharsh called him by telephone and remonstrated with him for having written it (R. 4320).

VI. The Court Was Correct in Denying Appellants' Motion to Strike the Testimony of the Witness Pineda

Appellants' motion for exclusion of evidence requested that the trial court strike practically all of the testimony adduced by the witness Pineda. In all, the motion set forth 24 matters concerning which Pineda testified and as to which the Court was requested to strike all of the testimony. Appellants have not attempted to deal separately with each of these 24 matters, nor shall we. They have contented themselves with arguing that an examination of Pineda's testimony in its entirety will manifest that it is permeated with prejudicial hearsay statements and irrelevant and immaterial testimony. Close scrutiny of the testimony of Pineda will reveal that such is not the case. The witness testified with respect to matters which he had observed and frauds in which he had participated. He placed one or more of the defendants at the scene during the commission of the acts about which he was testifying.

The testimony of the witness Pineda has been heretofore summarized in our statement, *supra* (pp. 7–21). It will be noted from that summary and from an examination of the testimony itself that the witness' statements were highly relevant and material, since they described instances in which Goverment inspectors were deceived as to the grade, quality, and weight of eggs and butter which required Government inspection. The witness was also able to place the defendants Berman, Goddard, Menges, and Moncharsh as participants in the actual deception of the Government inspectors.

In every respect the testimony of the witness Pineda was legally competent proof of the highest order, that of a participant and eyewitness, and as such was properly for the jury's consideration in determining the issues in this case.

VII. The Court Below Did Not Err in Failing to Give Instructions Requested by Appellants

Appellants assign as error the trial court's failure to include in its charge to the jury (R. 4356–4382) eight requested instructions.[7] The grounds of the exceptions to the charge as given do not appear in the record and are not specifically defined in appellants' brief. This Court heretofore has refused to review such alleged errors where, as here, the bases of the exceptions taken were of general application or were not definitely set forth. *Du Vall* v. *United States,* 82 F. (2d) 382, 383, 384 (C. C. A. 9, 1936), cert. den. 298 U. S. 667; *Goldstein* v. *United States,* 73 F. (2d) 804, 806, 807 (C. C. A. 9, 1934); *Bigliere* v. *United States,* 35 F. (2d) 847, 848 (C. C. A. 9, 1929).

The principles involved in six of the instructions requested were fully covered by the charge given.[8] Even though these instructions were proper in form and substance, it was not error for the court to dis-

[7] Instructions No. 55 (R. 107), No. 58 (R. 110), No. 63 (R. 112), No. 78 (R. 119), No. 92 (R. 127), No. 119 (R. 143), No. 120 (R 143), and No. 121 (R. 145).

[8] Instruction No. 55 is covered in the charge at R. 4357–4358, 4360, 4366–4367, and 4369; Instruction No. 58 is covered in the charge at R. 4370; Instruction No. 63 is covered in the charge at R. 4376–4377; Instruction No. 78 is covered in the charge at R. 4376–4377; Instruction No. 92 is covered in the charge at R. 4368; and Instruction No. 120 is covered in the charge at R. 4366–4368.

regard them and charge the jury in its own language as long as the essential aspects of the case were covered.

In *Thiede* v. *Utah,* 159 U. S. 510, 520 (1895), the Supreme Court, in affirming a conviction of murder, made the following comment with regard to the trial court's refusal to give instructions requested:

> An examination of the twenty-two instructions show that they are mainly directed to the matters or reasonable doubt, presumptions of innocence, circumstantial testimony, and confessions, in respect to which the court, while not using the language of counsel, substantially expressed the same propositions in its charge. Of course, it was under no obligations to use the precise language adopted by counsel, and if it fully covered the ground indicated by the the requests it is sufficient.

Similarly, in *United States* v. *Trenton Potteries Co.,* 273 U. S. 392, 396 (1926), the Supreme Court said on this subject:

> If the charge itself was correctly given and adequately covered the various aspects of the case, the refusal to charge in another correct form * * * was not error, * * *

To the same effect is *Sugarman* v. *United States,* 249 U. S. 182 (1918).

Instruction No. 119 (R. 143) was refused and was not specificaly covered in the charge, although the court adequately charged the jury as to matters which should be disregarded (R. 4377–4379). By this requested instruction it was sought to caution the jury that no inferences should be drawn from the fact

that defense counsel from time to time during the trial interposed objections to evidence. Such an instruction was not required under the issues and evidence of this case. The instruction is not supported by the authority cited by appellants. It is not error to refuse to give instructions which are not strictly applicable to the case under the evidence. *Battle* v. *United States,* 209 U. S. 36 (1908); *Taylor* v. *United States,* 142 F. (2d) 808 (C. C. A. 9, 1944), cert. den. 323 U. S. 723.

Instruction No. 121 involves the charge that a completed act which was not an offense at the time of its commission cannot become such by any subsequent act of the accused. Under the authorities above cited, it was not error to refuse this instruction. The court adequately covered in its charge the elements of the offense.

The charge to the jury, covering 26 pages of the printed record, fairly and fully covers every essential aspect of this case. This Court has laid down the rule in cases such as this, where evidence of guilt is convincing, that errors in the charge to the jury which do not affect the substantial rights of the accused are not ground for reversal of conviction. *Roubay* v. *United States,* 115 F. (2d) 49 (C. C. A. 9, 1940); *Wilton* v. *United States,* 156 F. (2d) 433 (C. C. A. 9, 1946); *Guy* v. *United States,* 107 F. (2d) 288 (App. D. C., 1939), cert den. 308 U. S. 618.

VIII. The Trial Court Was Correct in Admitting in Evidence the Testimony of Josephine I. Briant

The gist of the conspiracy was the circumvention of the Government's system of inspection of dairy

products, particularly eggs, being purchased by various Government agencies from appellant corporation. The appellant corporation was thus enabled to hoodwink the Government agencies into accepting delivery of inferior products in the belief that they were receiving the superior products for which they were billed and for which the Government was paying.

One of the means by which the appellants practiced these deceits was the tactic of substituting inferior grade eggs for those already examined and approved by Government inspectors.

The testimony of the witness Josephine I. Briant is particularly pertinent in this respect, since it relates to a specific instance in which inferior grade eggs were substituted for U. S. Specials (the highest grade) in cases which had already been inspected and approved by the representative of the Army Veterinary Corps.

Appellants make much of the argument that the witness did not see the Government order for the eggs in question and was unable to state positively that the substituted eggs were in fact delivered to the Government or one of its agencies. This argument misses the mark, since the evidence conclusively shows a fraud practiced upon one of the governmental functions, namely, the inspection of eggs. Mrs. Briant's testimony shows positively that inferior eggs were substituted in cases previously examined by a lieutenant of the Veterinary Corps of the Army and bearing the Veterinary Corps stamp. This in itself is a fraud upon one of the operations of the Government, namely, the inspection of eggs by its representative,

and it is also one of the important steps in carrying out the conspiracy.

Furthermore, the evidence of Mrs. Briant is corroborative of that of other witnesses which the Government had previously produced to prove the existence of the conspiracy. While the evidence may have been detrimental to the appellants in that it tended to substantiate testimony of previous witnesses, it was clearly admissible as showing one instance and one means by which fraud was practiced upon a Government agent and the operations of a governmental agency by the appellants, and thus was not improperly prejudicial.

IX. The Trial Court Properly Admitted Evidence of Other Offenses to Prove Intent, Motive, and Guilty Knowledge and Correctly Charged the Jury on That Subject

The charge of the Court in relation to transactions similar to those charged in the substantive counts of the indictment, was assigned as error. The charge is as follows:

> Testimony has been introduced by the prosecution which it is claimed tends to show the commission of other acts or offenses by the defendant similar to that charged in the indictment. I charge you that this evidence was admitted for the sole purpose of proving guilty intent, motive, or guilty knowledge of the defendant, and that it can be considered by you for no other purpose (R. 4377).

This charge related to the substantive counts alone for all of the evidence so adduced was unquestionably relevant to the charge of conspiracy. The transactions outlined in the substantive counts were, them-

selves, overt acts, and proof of them was competent to prove the conspiracy, but not all the overt acts were made the basis of substantive counts. As pointed out in appellants' brief (pp. 127, 128) Government counsel, at the conclusion of the Government's case and again at the conclusion of all the evidence, moved the Court that all evidence, documentary and oral, relating to the delivery of eggs on ships other than those mentioned in the substantive counts 2 to 7 (excepting only the evidence relating to the S. S. *Hawaiian Shipper*) be made applicable to the said substantive counts as touching the question of intent. The Court granted the motion at the conclusion of all the evidence, and charged the jury accordingly.

The real question here presented is whether, in the background and setting of this conspiracy, the charges in the substantive counts, based upon certain of the overt acts, can, for the purpose of showing knowledge and intent, be supported by evidence of other overt acts of a similar character, wholly relevant to the conspiracy charge but not included in the indictment as substantive counts.

It is of course the general rule that evidence of other offenses is not admissible to prove the crime charged, but there are a number of exceptions to this rule. Indeed it has been said that it is "difficult to determine whether the rule itself or the numerous exceptions thereto were the more extensive." *Johnson* v. *United States,* 22 F. (2d) 1 (C. C. A. 9). It is not open to question that similar transactions not too remote in time are admissible in certain types of

cases and for a variety of reasons. These reasons have been admirably summed up in *Martin* v. *United States,* 127 F. (2d) 865 (App. D. C.), from which we quote:

> Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial.

It must be borne in mind that all of this evidence was competent to prove the conspiracy charge, and would have gone to the jury in any event. As touching the substantive counts it was likewise submitted to the jury for whatever its probative value may have been to show the intent of the various defendants, including Moncharsh. On the admissibility of such evidence to show intent this Court has recognized and applied the exception to the general rule. A detailed analysis of the principles involved appears in *Tedesco* v. *United States,* 118 F. (2d) 737 (C. C. A. 9), at page 740, as follows:

> The general rule, however, is modified by a well-recognized exception thereto, which has the sanction of the best law writers, both judicial and academic. That exception may be stated as follows: "* * * where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in

civil cases, to introduce evidence of other acts and doings of the party, of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment." *Wood* v. *United States*, 41 U. S. 342, 360, 16 Pet. 342, 360, 10 L. Ed. 987, per Mr. Justice Story. This exception has been applied with uniformity down through the years. See *Neff* v. *United States*, 8 Cir., 105 F. 2d 688, 691; *Baish* v. *United States*, 10 Cir., 90 F. 2d 988, 990; *Breedin* v. *United States*, 4 Cir., 73 F. 2d 778, 780; *Hood* v. *United States*, 10 Cir., 59 F. 2d 153, 154; *Butler* v. *United States*, 10 Cir., 53 F. 2d 800, 805; *Hatem* v. *United States*, 4 Cir., 42 F. 2d 40, 41; *Kinser* v. *United States*, 8 Cir., 231 F. 856, 860; *Schultz* v. *United States*, 8 Cir., 200 F. 234, 237; *Colt* v. *United States*, 8 Cir., 190 F. 305, 307; *Bottomley* v. *United States*, 3 Fed. Cas. 968, 971, No. 1,688. The exception has also been stated negatively—"Relevant and competent evidence of guilt is not rendered inadmissible because it also tends to prove that the defendant committed another offense." *Crapo* v. *United States*, 10 Cir., 100 F. 2d 996, 1001. See also *Minner* v. *United States*, 10 Cir., 57 F. 2d 506, 510. In addition, at least two of the authorities offered by the appellant recognize and discuss this exception. *Coulston* v. *United States*, 10 Cir., 51 F. 2d 178, 180, 181; *Paris* v. *United States*, 8 Cir., 260 F. 529, 531. We take the following apt quotation from Jones Commentaries on Evidence, vol. 2, § 624, pp. 1160–1162: "Although the rule [that proof of a distinct, independent offense is inadmissible] is stringent, in criminal cases the conduct of the prisoner on other occasions is

> sometimes relevant, where such conduct has no other connection with the charge under inquiry than it tends to throw light on what were his motives and intentions in doing the act complained of. The intention with which a particular act is done often constitutes the burden of the inquiry, and to prove the intent it becomes necessary, in many instances, to extend the examination beyond the particular transaction concerning which the accused is upon trial. For the purpose, therefore, of proving intent, not of proving the act itself, it is often permissible to show other criminal transactions of the same sort springing from like mental condition." See also Wigmore on Evidence, 2d Ed., vol. 1, §§ 300, 302, pp. 608, 611–616; Wigmore's Principles of Judicial Proof, 2d Ed., § 116, pp. 224–228; Atwell, Federal Criminal Law, § 26d, p. 166; 20 Am. Jur. §§ 309, 313, pp. 287, 293–296; 62 L. R. A. 193, 214, note.

The exception, i. e., to prove intent, finds its most frequent application in cases of fraud. *Simpkins* v. *United States,* 78 F. (2d) 594 (C. C. A. 4); *Tincher* v. *United States,* 11 F. (2d) 18 (C. C. A. 4) cert. denied 271 U. S. 664; *Weiss* v. *United States,* 122 F. (2d) 675 (C. C. A. 5), cert. denied 314 U. S. 773. The following excerpt from the *Weiss* decision (p. 682) is a lucid exposition of the principles involved:

> The general rule is that evidence of another crime unconnected with the one on trial is inadmissible, but this rule is subject to a number of exceptions, the first of which is that evidence of other offenses by the accused is admissible

> to show his criminal intent as to the offense charged, where the other offenses are similar to and not too remote from that charged, and where intent is in issue as an element of the offense charged. Another exception is where the evidence of a separate crime tends to explain, illustrate, or characterize the act charged when such act is capable of more than one construction. Another is to rebut a claim of mistake or inadvertence. An exception also applies where the crime charged is one of a series of swindles or other crimes involving a fraudulent intent, or where the crime charged is part of a plan or system of criminal action. *It is clearly admissible in prosecutions for obtaining money by false pretenses.* The length of time over which an inquiry as to other offenses may extend is within the sound discretion of the trial court. [Italics supplied.]

The Court goes on to observe that some of these exceptions are more apparent than real. Thus it was stated, quoting Greenleaf, that "in some cases, however, evidence has been received of facts which happened before or after the principal transaction and which had no direct or apparent connection with it; and therefore might seem, at first view, to constitute an exception to this rule. But those will be found to have been cases, in which the *knowledge* or *intent* of the party was a material fact, on which the evidence, apparently collateral, and foreign to the main subject, had a direct bearing and was therefore admitted. * * * Cases of this sort, therefore, instead of being exceptions to the rule, fall strictly within it."

Further analyzing the law the Court quoted from Reynolds on Evidence, 4th Ed., p. 13:

> Thus, where the question is whether an act done by A. was committed with a fraudulent intent, his fraudulent conduct to third parties in similar transactions about the same time is a relevant fact to show his animus (*McAleer* v. *Horsey,* 35 Md. 439, 461; *Bottomley* v. *United States,* 1 Story 135, 3 Fed. Cas. [page] 968 [No. 1,688]; *Castle* v. *Bullard,* 23 How. 172 [16 L. Ed. 424]; *Lincoln* v. *Claflin,* 7 Wall. 132 [19 L. Ed. 1061]; *Mutual Life Ins. Co.* v. *Armstrong,* 117 U. S. 591 [6 S. Ct. 877, 29 L. Ed. 997]); and so, also, where there is a question as to whether an act was accidental or intentional, the fact that such an act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is a relevant fact to show intention on his part. Id.

It is observed that one of the so-called exceptions to the general rule is that evidence of similar transactions is admissible to show a general scheme, or a common plan or a course of conduct. *United States* v. *Gen'l Motors,* 121 F. (2d) 376 (C. C. A. 7); *Boehm* v. *United States,* 123 F. (2d) 791 (C. C. A. 8); *American Medical Ass'n* v. *United States,* 130 F. (2d) 233 (App. D. C.); *McDonald* v. *United States,* 133 F. (2d) 23 (App. D. C.); *Egan* v. *United States,* 137 F. (2d) 369 (C. C. A. 8); *Heike* v. *United States,* 227 U. S. 131. In this case all of these things were shown to exist. They were part and parcel of the conspiracy charged in count 1, and all the evidence objected to in this assignment was directly competent and relevant under

that count, for a general scheme or a common plan or a course of conduct, if engaged in by two or more parties in a criminal endeavor, is the essence of conspiracy. The transactions here involved in the substative counts were themselves illustrative of the general scheme, the common plan, and the course of conduct, and constituted specific overt acts in the conspiracy. If there had been no charge of conspiracy and the case had been tried on the substantive counts alone, the evidence of these other similar transactions, as well as the evidence connecting Moncharsh with the general scheme would have been admissible under at least four (1, 2, 3, and 4) of the apparent exceptions listed in *Martin* v. *United States, supra.* See *United States* v. *Kelley,* 105 F. (2d) 917.

Appellant Moncharsh complains that there was no evidence connecting him specifically with the transactions set forth in the substantive counts. It is pointed out, however, that there was an abundance of evidence from which the jury could and did find that a general scheme, or a common plan, i. e. a conspiracy, existed and that Moncharsh was a party to it, and under such circumstances it was unnecessary to show that he participated personally in these substantive transactions. A similar contention was made in *United States* v. *Uram,* 148 F. (2d) 187 (C. C. A. 2), and the Court said, at page 190:

> Sohmer's contention that there is no proof of his connection with the alleged crime—that he was present merely when the Campbells

> signed the applications in blank—has only plausibility for its support. A reading of the record removes any apprehension one might otherwise have as to his guilty participation in the commission of the fraud. *Hyde* v. *United States,* 225 U. S. 347, 32 S. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614. He was the instigator of the whole transaction, was present at its inception, a real participant therein, and a beneficiary thereof. So the jury could have well found, and did find from all the evidence.

Finally, the exact point here presented was recently discussed by the Supreme Court in *Pinkerton* v. *United States, supra,* which is quoted at length under Point II B of this brief at pages 98, 99 and 100. The principles discussed in that case are identical with those here involved, and we again refer to the above quotation.

To support the Government's contention, authorities could be multiplied indefinitely, for as this Court said in the *Johnson* case, *supra,* it is difficult to determine whether the rule itself or the exceptions thereto are the more extensive. We have therefore limited ourselves to the citation of those cases which, we believe, will be most helpful in passing upon the issues, and we accordingly submit that the Court's action in granting the motion (quoted on page 128 of appellants' brief) was correct, and that there was no error in the charge to the jury.

CONCLUSION

The trial of this case consumed more than eleven weeks, the printed record is in eleven volumes. Able and astute counsel for the defendants were ever alert to protect their interests, and the distinguished jurist who presided was just as alert to preserve for the defendants every right to which the law entitled them. They were convicted by the jury's verdict by evidence so overwhelming in its convincing force and under a record so clearly free from prejudical error that the trial court denied them bail on appeal.

With this long record, if any error appears, we believe the provisions of Section 269 of the Judicial Code, as amended (28 U. S. C. 391) are particularly applicable, as follows:

> On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.[9]

In the recent case of *Kotteakos* v. *United States,* 328 U. S. 750, the Supreme Court presents a comprehensive discussion of the effect of and the proper consideration to be given to that section. It is pointed out that the salutary policy embodied in the section was adopted by Congress after long agitation under distinguished professional sponsorship in order to de-

[9] See Rule 52 (a) of the Rules of Criminal Procedure for a restatement of 28 U. S. C. 391.

feat and correct the widespread conviction that criminal trial had become a game for sowing reversible error in the record, only to have repeated the same matching of wits when a new trial had thus been obtained. Beginning on page 759 of the report, the Court says:

> In the broad attack on this system great legal names were mobilized, among them Taft, Wigmore, Pound and Hadley, to mention only four. The general object was simple. To substitute judgment for automatic application of rules; to preserve review as a check upon arbitrary action and essential unfairness in trials, but at the same time to make the process perform that function without giving men fairly convicted the multiplicity of loopholes which any highly rigid and minutely detailed scheme of errors, especially in relation to procedure, will engender and reflect in a printed record.
>
> The task was too big, too various in detail, for particularized treatment. Cf. *Bruno* v. *United States,* 308 U. S. 287, 293. The effort at revision therefore took the form of the essentially simple command of § 269. It comes down on its face to a very plain admonition: "Do not be technical, where technicality does not really hurt the party whose rights in the trial and in its outcome the technicality affects." It is also important to note that the purpose of the bill in its final form was stated authoritatively to be "to cast upon the party seeking a new trial the burden of showing that any technical errors that he may complain of have

affected his substantial rights, otherwise they are to be disregarded."

On the record the appellants were properly convicted, and we respectfully submit that the judgment should be affirmed.

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APPENDIX

TITLE 18, SECTION 80

§ 80. (Criminal Code, section 35 (A).) Presenting false claims. Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

TITLE 18, SECTION 88

§ 88. (Criminal Code, section 37.) Conspiring to commit offense against United States. If two or more persons conspire either to commit any offense against

the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

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